COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1985

Nova Scotia

Department of Labour

Research Division

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COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS
1985

NOVA SCOTIA DEPARTMENT OF LABOUR
RESEARCH DIVISION

HONOURABLE BRIAN YOUNG
MINISTER

H. R. MACDONALD
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FOREWARD

This publication is the seventh summary of grievance arbitration decisions (awards) produced by the Nova Scotia Department of Labour. The decisions listed are those which have been filed in accordance with amendments to the Trade Union Act effective May 1978. On occasion summaries of arbitrations outside the jurisdiction of Nova Scotia have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Nova Scotia Trade Union Act and have been included as a matter of general interest. Subsequent to this date, summaries of grievance arbitration decisions have been prepared and released in the publication Collective Bargaining Review. Further arbitration awards received by the department will continue to appear in the above publication.

Appeals of arbitration decisions made to the Supreme Court of Nova Scotia do not necessarily get filed with the Nova Scotia Department of Labour. Results of appealed decisions are received on an an hoc basis and are reported as they arrive.

Part 1 of this publication lists grievance arbitration awards by decision number. All indices are retrospective to include the years 1978 through 1985. For summaries of decisions previous to 1985 it is necessary to refer to the appropriate issue for that year. Indexation of arbitration awards is based on Canadian Labour Arbitration by Donald J. M. Brown and David M. Beatty (Agincourt: Canada Law Book Co., 2nd ed., 1984).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Inquiries relating to the enclosed can be directed to the Nova Scotia Department of Labour, Research Division, Library, P. O. Box 697, Halifax, Nova Scotia, B3J 2T8 (Phone: 424-4313).

Jean Dobson
Director

Research Division
Nova Scotia Department of Labour
Halifax, Nova Scotia
1986

PART 1

LISTING OF GRIEVANCE ARBITRATION DECISIONS, 1985

DECISION: 84-74A

City of Halifax AND Halifax Police Officers & NCO'S Association

Mr. Justice D. Merlin Nunn, Nova Scotia Supreme Court, Trial Division

Nancy I. Murray, for the union
Gerald Goneau, for the employer
July 18, 1985

ISSUES: Remedial Authority of the Arbitrator 2:1400; Judicial Review: Arbitral Discretion 1:1500; Grounds for Review: Excess of Jurisdiction 1:5300.

CIRCUMSTANCES: The union appealed a decision and award by a Board of Arbitration in a grievance that the employer had not followed the procedures required for promotion per the collective agreement. The Board allowed the grievance but devised a novel remedy, that of red-circling the seniority of the employee improperly promoted.

AWARD: The Court found that, in awarding the remedy of red-circling seniority, the Board had exceeded its jurisdiction by in effect amending the collective agreement. Also, the decision of the Board with regard to remedy only was patently unreasonable, in that it gave virtually full effect to the complaint grieved even as it allowed the grievance. The remedy was upset and referred back to the employer for decision.

AUTHORITIES: Association of Radio and Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corporation (1973), 40 D.L.R. (3d) 1, 73 CLLC 14, 189 (S.C.C.); The Arbitration Act, R.S.N.S. 1967, c.12, s.12 and s.13.

DECISION: 84-78B

Cape Breton Development Corporation AND United Mine Workers of America, District No. 26, Local 4522

Matthews, J. A., Clark, C. J. N. S., Pace, J. A., Supreme Court of Nova Scotia Appeal Division

Murray Hennem, for the union
Eric Durnford and Brian G. Johnston, for the employer
October 21, 1985

ISSUES: Strikes and Lockouts 9:2100; Evidence: Burden of Proof 3:2400; Standard of Proof 3:2500; Interpretation: Reasonableness 4:2100; Judicial Review: Grounds for Review - Error of Law on Face of Record 1:5400; Fact Finding 1:5230.

CIRCUMSTANCES: During an illegal strike by some of its employees, the employer sent home from work other employees who belonged to the same union. The union grieved this action as a lockout. The grievance succeeded at arbitration, and the award was upheld by the N. S. Supreme Court Trial Division when the employer applied to quash the arbitrator's decision. The employer appealed, arguing that the arbitrator erred in finding that the employer's action had constituted a lockout under the Canada Labour Code, and that he had made his decision without evidence.

The parties also sought the Court's interpretation of Article 33 of the collective agreement dealing with advance notice when abolishing positions.

AWARD: The appeal was allowed and the arbitrator's decision quashed and set aside. The Court held that the arbitrator's conclusion that the employer sent home its employees not simply to save costs but to put pressure on the union to settle the illegal strike was not a reasonable inference but merely conjecture. The onus was on the union to prove a lockout had occurred, and it failed to provide sufficient evidence.

The Court also disagreed with the arbitrator's interpretation of Article 33, holding that the term "abolish" did not apply to this situation of a temporary lay-off.

AUTHORITIES: Volvo Canada Limited v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 720 (1980), 1 S.C.R. 178; McLeod et al. v. Egan et al. (1974), 46 D.L.R. (3d) 150; Brown & Beatty, Canada Labour Arbitration (2nd ed.), p.654; Jones v. Great Western Railway Company (1931), 144 L.T. 194; Grey v. Parsons (1857), 6 H.L.C. 61 (O.E.R. 1216); Canada Labour Code, R.S.C. 1970, c.L-1, s.107.

DECISION: 85-01

The Nova Scotia Liquor Commission AND The Nova Scotia Liquor Commission Employees, Local 470

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
James Leefe, Q.C., for the employer
January 2, 1985

ISSUE: Discipline: Fighting, Assault 7:3430, Disciplinary Penalties 7:4000, Scope of Review 7:4100.

CIRCUMSTANCES: The grievor grieves wages lost due to a one day suspension. The grievor, a clerk, attended a meeting between his store manager and fellow clerks. The meeting was called by the Area Supervisor to reduce friction. The manager attacked the grievor as a result of an argument ensuing from the manager interrupting the grievor while he had the floor at the meeting. The grievor kicked the manager during the altercation. Both the grievor and the manager were suspended for one day. The union argues that the grievor acted in self defense.

AWARD: The grievance succeeds. The manager's actions were totally unjustified. The grievor acted in self defense. The employer is ordered to pay the grievor one day's wages and remove the suspension from his record.

DECISION: 85-02

Labourers' International, Local 615 and Carpenters and Joiners of America, Local 1392 AND D. J. Floyd Construction and Landing Construction Limited.

N. M. Scaravelli, Arbitrator

John C. MacPherson, for the union
Harold A. MacIsaac, for the employers
January 8, 1985

ISSUE: Union Security 9:1200; Jurisdiction of the Arbitrator: Improper Work Assignments 2:1424, Damages 2:1410, Ordering Costs 2:1430, Union Security Claims 2:1426.

CIRCUMSTANCES: The unions grieve for lost wages and benefits due to the employers' failure to use unionized workers. The employer, D. J. Floyd Construction Ltd., is subject to collective agreements with the unions. The employer, Landing Construction Ltd., is not a unionized company but was found, upon application to the Nova Scotia Labour Relations Board, to be a related business pursuant to s.20 of the Trade Union Act and therefore both employers constitute a single employer. Upon receipt of the Labour Board decision on May 27, 1984, the Business Manager for the Carpenters' union notified by telephone the president of the employer. The employer appealed the decision and notice of its failure was received by the president on August 16, 1984. In the interim period from May 27 to August 16 no requests were made for union workers and the unions received no dues.

The unions argue that the union security provisions in their respective collective agreements were breached and claim lost wages, union dues, pensions and other benefits as per the collective agreements. They also claim costs on a solicitor-client basis.

The employer argues that no requests were made for union workers because the decision was under appeal. It also argues that any claims should be against Landing Construction alone and that the union ought to have organized the employees of the employer's competitors to mitigate losses.

AWARD: The grievance succeeds. The employer had no legal basis for non-compliance with the Board's decision as there was no application to stay proceedings pending the appeal. The date of the breach ran from May 30, 1984, which was the date on which the employer actually received the Board's decision. Both companies are jointly and severally liable. There is no duty upon the union to organize the employer's competitors to

mitigate losses. The employer is ordered to pay the employees and the unions as if there had been no breach. The unions' claim for solicitor-client costs fails as the collective agreements are silent as to costs and the arbitrator therefore has no jurisdiction to so award.

AUTHORITIES: Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1973), 4 L.A.C. (2d) 254 (O'Shea); quashed 6 L.A.C. (2d) 34n, 48 D.L.R. (3d) 191, 4 O.R. (2d) 423 (Ont. Div. Ct.); restored 9 L.A.C. (2d) 26n, 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 (Ont. C. A.); Burrand Yarrows Corp. and Brotherhood of Painters (1981), 30 L.A.C. (2d) 331 at p. 340; Re Mckenna Brothers Ltd. and Plumbers Union, Local 527 (1975), 10 L.A.C. (2d) 273 (Shime); R. M. Hardy and Associates Ltd. and Teamsters, Local Union 213, (1977) 2 Can. L.R.B.R. 357 at p. 373; Brown and Beatty, Canadian Labour Arbitration (1977) pp. 52-3, 61.

DECISION: 85-03

The Board of Management of the Kings Regional Health and Rehabilitation Centre AND Canadian Union of Public Employees, Local 1472.

Charles Weir, Judge J. A. MacLellan, Donald H. MacDougall, Q.C.; Arbitration Board

N. Blaise MacDonald, for the union
A. William Cox, Q.C., for the employer
January 18, 1985

ISSUE: Discipline: Warnings, Suspension, Discharge 7:3542, Refusal to Follow Instructions 7:3610, Mitigating Factors 7:4400.

CIRCUMSTANCES: The grievor, a Certified Nursing Assistant, grieves her suspension and subsequent dismissal and requests reinstatement without loss of pay, seniority or benefits. The grievor was employed in a rehabilitation centre for the mentally handicapped in which a structured program was in place to teach the residents to perform some of their own daily care. The grievor showed insensitivity to the requirements of this program, the most severe incident of which involved the physical abuse of a resident in the attempt to deter harmful behavior. The employer argued that the standard of care required in the treatment of such residents is high and requires a gentle manner.

Other less serious incidents were also recorded but the grievor received a warning, an oral one, on only one occasion. Other employees were disciplined in only a minor way for breaches which were in a similar vein, if somewhat less serious.

AWARD: The grievance succeeds in part. While it was clear to the Board that the grievor had no intention of harming the resident by pursuing her method of deterrence, in light of the high standard of care required, her actions constituted just cause for discipline. Discharge, however, is too severe a penalty in light of the following mitigating factors: her generally satisfactory work and discipline records, her personal

motivation, the manner in which she and other employees had been disciplined on previous occasions, and the stress that her pregnancy had caused her while doing this work.

The Board ordered that she be reinstated as a probationary employee, such probation to last for a maximum of one year. As the grievor had her license suspended for most of the period of dismissal there is no requirement that she be paid compensation for her lost wages and benefits.

AWARD: Re Baptist Housing Society (Grandview Towers) v. Hospital Employees Union (1982) 6 L.A.C. (3d) 430 (Greyall).

DECISION: 85-04

Phillips Cables Limited AND International Brotherhood of Electrical Workers, Local 625

Judge J. A. MacLellan, Chairman; Rene Quigley, Eric Durnford

January 29, 1985

ISSUE: Job Classification and Descriptions, Creation and Revision 5:2000, 5:2440; Change of Work Load/Job Function 5:2410.

CIRCUMSTANCES: The employer eliminated one job classification and redistributed the work to two existing classifications. The union grieves the lack of pay increase to these two positions arguing for a $.60/hour increase each. The union argues that the Collective Agreement provisions concerning changing job classifications has not been complied with. The employer argues that the changes are not big enough (they amount to an extra 40 minutes to one hour per eight hour shift for one position and one to two hours per shift for the other) to constitute a change in classification and are therefore not covered by the Collective Agreement.

AWARD: The grievance fails. The job functions have not undergone a substantial qualitative change and are therefore not covered by the Collective Agreement. The Board is compelled to comment on the arbitrary way the change was made with little or no consultation with the union.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d) p. 233.

DECISION 85-05

The City of Sydney AND Canadian Union of Public Employees, Local 933

Charles O'Connell, Chairman; Duncan MacKay, Tom Pickford

Gerald Yetman, for the union
Michael Whalley, for the employer
January 18, 1985

ISSUE: Job Classification and Description, Creation or Revision 5:2000; Change of Work Load/Job Function 5:2410; Evidence, Extrinsic 3:4400.

CIRCUMSTANCES: This grievance concerns the classification of seven employees. The employer raises the preliminary objection of arbitrability alleging an oral agreement dealing with the subject matter of the grievance. The grievance of the first employee was withdrawn, that of the second settled. The union argues the remaining employees have had a substantial increase in work load and ought to be reclassified to a higher classification. The union argues the job functions of the sixth and seventh employees have also changed.

AWARD: The grievance succeeds in part. The preliminary objection is dismissed because the Collective Agreement is clear and unambiguous. Any extrinsic evidence as to the alleged agreement is inadmissable.

The employer agrees to reclassify the third employee. The fourth employee is reclassified from Keypunch Operator to the bottom Accounting Clerk 3 (requested Accounting Clerk 2). The fifth is reclassified top of Accounting Clerk 4 from Keypunch Operator (requested Accounting Clerk 3). The sixth is reclassified from Senior Clerk 3 to bottom Senior Clerk 2 as requested. The seventh is reclassified bottom Senior Clerk 3 from Clerk Steno 1 as requested.

DECISION 85-06

The Dartmouth General Hospital AND The Nova Scotia Nurses' Union

Clause H. Foisey, Q.C., Chairman; Donald H. MacDougall, Q.C.; Raymond F. Larkin

David Reynolds, for the union
Brian Johnston and Sarah Filbee, for the employer
February 4, 1985

ISSUE: Discipline and Discharge, Alteration of Grounds 7:2200, Grounds for 7:3000, Attitude 7:3580, Work Performance, Carelessness 7:3520, Culpable Incompetence 7:3510, Disciplinary Penalties, Mitigating Factors, Employment Record 7:4428, Arbitral Review, Scope 7:4100, Substitution of Penalty 7:4000.

CIRCUMSTANCES: The grievor was dismissed for a rather complex series of events, specifically making serious errors in nursing procedure, not following standard reporting procedures and lack of remorse when confronted with these incidents.

The grievor was working in the emergency room during the first incident. She was told by the duty doctor to give a very large dose to a patient in an unusual manner. She was told that the duty doctor had consulted with the specialist who concurred with the treatment. She did not file an Incident Report.

The second event involved a mislabelling of a blood sample which was detected by the lab. The grievor took a further sample, without additional authorization and did not chart her error or file an Incident Report.

The employer argues that the grievor's responsibilities go beyond clarifying questionable orders to bringing up the point with the doctor. Her failure to do so, to adequately chart it, and to file an Incident Report when combined with the failure to follow procedures in the second incident regarding charting and filing an Incident Report constitute just cause.

AWARD: The grievance succeeds. The Board disagrees with the employer's contention that the grievor was in error. She was acting under what she considered to be orders of a specialist. Nonetheless the charting was substandard and given the unusual nature of the incident a report ought to have been filed. The second incident is less serious and while procedures were not followed evidence shows that the procedures themselves were not clear and it was not the type of event to give rise to discipline. It would appear that in subsequent events the grievor and employer misunderstood the exact nature of each other's position and her refusal to admit to making an error was misunderstood. In light of our first finding we agree with the grievor's position in not admitting to an error.

The employer has attempted to raise new grounds on this hearing. This is disallowed because it could have been dealt with earlier and the grievor has not had an opportunity to prepare a response.

The employer will reinstate the grievor with full pay and benefits less income earned in the interim. The duty to mitigate must be considered. The grievor will be reintegrated in another department and then reintroduced to the emergency room. A letter of reprimand will be sent to the grievor concerning the lack of an Incident Report in the first incident. The grievor is ordered to provide a report on the first incident. The employer is to provide counselling concerning reporting procedures.

Jurisdiction is reserved concerning any difficulties concerning reintegration and the amount of the monetary award.

PARTIAL DISSENT: MacDougall differed with the majority as to the interpretation and weight to be given the evidence. Not enough attention and import was given by the majority to the inconsistencies in the grievor's evidence and the difficulties under which the employer functioned. The grievor's behaviour contributed to the discharge decision in not being forthright. She likewise has exhibited little effort to find new work. The evidence supports reinstatement but a three month suspension ought to be substituted and the grievor ought to bear the substantial share of her lost wages and benefits.

AUTHORITITES: Re Canadian Lukens Ltd., 12 L.A.C. (2d) 439 (Schiff); Re Owen Sound General and Marine Hospital, 14 L.A.C. (2d) 192 (Abbott); Re Baptist Housing Society (Grandview Towers) v. Hospital Employees' Union (1982), 6 L.A.C. (3d) 430; Carling Breweries Ltd. and United Brewery Workers Local 173, 17 L.A.C. 138 (Arthur); City of Dartmouth and Nova Scotia Union of Public Employees (1980), 27 L.A.C. (2d) 97.

DECISION: 85-07

City of Halifax AND Halifax Civic Workers Local Union 108.

Milton Veinot, Chairman; J. W. Ross, Michael Moreash

Bruce Evans, for the union
Gerry Goneau, for the employer
January 15, 1985

ISSUE: Insurance and Welfare Plans, Entitlement to Benefits 8:3320, 4:2100; Lay-off, Notice 6:2320.

CIRCUMSTANCES: The grievor is a seasonal employee. He fell and injured himself at work. He had received his lay-off notice earlier that day. According to the notice he would have been laid off on October 15. The grievor received Workers' Compensation until November 25. The union argues he is entitled to his full benefits from October 15 to November 25 while the employer argues its liability ended on October 15. The union argues the grievor is also entitled to an additional period of notice of lay-off as of November 25 or damages in lieu.

AWARD: The grievance succeeds in part. The grievor was squarely within the compensation provisions of the Collective Agreement. The wording of the lay-off provisions does not support the argument that it is intended to affect vested rights, even those that arise after the notice. As such the employer must pay benefits for the period October 16-November 25. The grievor is not entitled to additional notice under the Agreement as proper notice has already been given and the grievor clearly understood he was laid off. In the event the Agreement does require additional notice the Board in its discretion declines to award damages. Jurisdiction over the amount of benefits is reserved in the event that the parties cannot come to an agreement.

AUTHORITIES: Re Herb Fraser and Associates Ltd. and United Steelworkers, Local 7022 (1979), 23 L.A.C. (2d) 311 (O'Shea); Re City of Toronto and Canadian Union of Public Employees, Local 43 (1974), L.A.C. (2d) 160 (Adams); Re United Automobile Workers, Local 112 and DeHaurlland Aircraft of Canada Ltd. (1970), 21 L.A.C. 236 (Weatherhill); Re Halifax Civic Workers Union, Local 108 and the City of Halifax (june 17, 1975); Lufkin Rule Co. of Canada Ltd. (1970), 22 L.A.C. 276 (Shime); Brown and Beatty, Canadian Labour Arbitration (2d) p. 73.

DECISION: 85-08

Highland View Regional Hospital AND The Canadian Union of Public Employees Local Union 920

Innis Christie, Arbitrator

A. K. Cunningham, for the union
Robert Cook, for the employer
February 5, 1985

ISSUE: Job Posting, Evidence, Experience Gained After 3:4200; Skill and Ability, Arbitral Review 6:3100, Senior Employee if Relatively Equal 6:3220, Trial Training and Familiarization Periods 6:3230, Intepretation, Skill and Ability 6:3100.

CIRCUMSTANCES: The grievor grieves the placement of a casual employee in a posted position for which she had competed. The successful applicant had previous experience in the position on a casual basis and was fully trained. While the grievor is clearly senior and of similar educational background, she has no experience in the position in question and would require a substantial period of training.

The union argues that as Article 3.05 of the Collective Agreement excludes casual employees from the Agreement the successful applicant, as a casual employee, had no standing to apply for the position under the Agreement. It further argues the experience gained as a casual employee ought not to be considered in judging qualifications for permanent jobs lest the seniority provisions be circumvented. As such the union argues Article 13.02 requires the position to go to the grievor, their skills being "relatively equal" and the grievor being more senior.

AWARD: The grievance fails. Article 13.02 is not restricted by the exclusion in Article 3.05 as Article 13.02 refers to applicants in general and does not limit them to full time members of the bargaining unit as would be the effect of the union's argument.

It is proper to consider experience gained as a casual employee where there is no evidence of bad faith by the employer in attempting to circumvent seniority requirements. Here there is no evidence or allegation of bad faith, unreasonableness or arbitrariness.

The employer judges skills and abilities at the time of deciding who shall get the job. An arbitrator may refer to subsequent events when making his decision. Given the experience of the successful applicant in the casual position it cannot be said that the grievor's qualifications were relatively equal.

AUTHORITIES: American-Standard Products Canada Ltd. (1965), 16 L.A.C. 210 (Little); Fiberglass Canada Limited (1965), 16 L.A.C. 210 (Reville); City of Vancouver (1982), 5 L.A.C. (3d) 375 (Larsen); Radio Shack Division Tandy Electronics Ltd. (1980), 27 L.A.C. (2d) 221 (Carter); Island Telephone Co. (1983), 8 L.A.C. (3d) 132 (Christie); Chicago Rawhide Products, Canada Ltd. (1979), 22 L.A.C. (2d) 45 (Brundt); Canadian International Paper Co. (1967), 18 L.A.C. 147 (Adell); Ottawa General Hospital (1982), 2 L.A.C. (3d) 1 (P. Picher); Scarborough General Hospital (1979), 23 L.A.C. (2d) 190 (Swan); Westell Products Ltd. (1960), 11 L.A.C. 199; Island Telephone Company (1983), 8 L.A.C. (3d) 132; Brown and Beatty, Canadian Labour Arbitration (2d) 6:3100.

DECISION: 85-09

CKF Inc. AND Canadian Paperworkers Union, Local 576

R. J. Downe, Q.C., Chairman; John Kane, Eric Durnford

Dennis Grant, for the union
John D. Plowman, Karin McCaskill, for the employer
January 22, 1985

ISSUE: The Collective Agreement: Ancillary Documents 4:1200; The Arbitration Process: Past Practice 3:4430; Jurisdiction of the Arbitrator: The Doctrine of Estoppel 2:2210, Applications of Estoppel 2:2220, Abandonment, Settlement and Withdrawal 2:3230; Management Rights: Schedules 5:3100.

CIRCUMSTANCES: The union grieves the work scheduling of certain employees, claiming that is was in contravention of a work-sharing agreement. The written form of the work-sharing agreement was marked "draft " and had not been executed. A clause in that draft memorandum stated that the work was to be shared "as broadly as practical". The work-sharing arrangements were decided in a meeting between the employer and the union and worked well for two weeks. The superintendent responsible, believing that the number of shifts which had been agreed upon and which had been worked in the first two weeks of the arrangement was the standard, scheduled the same number of shifts although several employees were on vacation. This meant that all available employees were working full time. Upon seeing this schedule the manager altered it so that the available employees shared the work; resulting in a lesser number of shifts than had been the practice in the previous two weeks.

The union argued that the arrangement could not be altered without its consent, that the number of shifts which the superintendent had relied upon as being the standard was not to be reduced, that there was no change in workload requiring a further reduction in work.

The employer argued that it retains the right to schedule work, determine workload and that its rights are not limited by the collective agreement or abrogated by the memorandum re worksharing. Further it argued that previous non-action by the union on a similar issue prevents it, by estoppel, from now enforcing such a right.

AWARD: The grievance fails. The memorandum is not binding on the employer and no document expressly stipulates the number of shifts to be worked. The memorandum allows the union to participate in the determination of which employees are to work which days but does not confer the right to determine the number of shifts to be worked. The employer retains full management rights to determine matters of scheduling, vacation and workload as per the collective agreement.

The requirements for the employer's estoppel argument are not met as in the previous instance there was no arbitration decision, no formal resolution of the complaint, no grievance filed, and the union's position was not formally abandoned, it merely declined to proceed with the matter. Therefore the employer could not preclude the union from asserting this grievance.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p. 105; Palmer, Collective Agreement Arbitration in Canada (2nd ed.) p. 212ff; Annapolis Regional Schools and the Nova Scotia Teachers Union, June 18, 1981, (R. L. MacDougall); C.U.P.E. and the City of Sudbury (1965) 15 L.A.C., 403.

DECISION: 85-10

Canadian Union of Public Employees, Local 2784 AND Extendicare, A Division of Crownx Inc. Operators of Park Haven, Halifax, Nova Scotia

Innis Christie, Chairman; Gregory I. North, Raymond F. Larkin

N. Blaise MacDonald, for the union
John Plowman, for the employer
February 25, 1985

ISSUE: Jurisdiction of the Arbitrator: The Collective Agreement 2:1200; The Collective Agreement: Retroactivity 4:1610, Term and Termination 4:1620.

CIRCUMSTANCES; Grievor grieves termination of employment alleging lack of just cause and requests reinstatement without loss of pay, seniority and benefits. Grievor was discharged from employment on April 10, 1984. At this time there was no collective agreement between the parties though a first agreement was being negotiated and was ratified by the union membership on June 8, 1984, ratified by the employer on June 11, 1984 and signed by both parties on June 18, 1984 for a term commencing June 20, 1983.

On June 12, 1984, the union told the employer of its desire to contest the dismissal of the grievor through the grievance and arbitration procedure. The hearings pursuant to this decision were for the purpose of determining a preliminary objection to the arbitrator's jurisdiction over this matter.

AWARD: The grievance fails as the preliminary objection re jurisdiction succeeds. While the collective agreement runs from June 20, 1983 this retroactivity refers only to monetary items. The retroactivity on non-monetary items requires express language to that effect so as to not defeat the reasonable expectations of the parties involved. Such language is not present in the collective agreement in question. An opportunity to include such language was clearly available to the union particularly since the grievor was a member of the bargaining committee.

AUTHORITIES: Re International Chemical Workers, Local 4121 and Perick Canada Ltd. (1966) 17 L.A.C. 291 (Weatherill); Re Sturgeon General Hospital and Canadian Union of Public Employees, Local 1335 (1974), 6 L.A.C. (2d) 360 (Taylor): Brown and Beatty, Canadian Labour Arbitration (2d), p. 184; Palmer, Collective Agreement Arbitration in Canada (2nd ed.) pp. 110-111; Re Canadian Canners Ltd. and International Association of Machinists (1973), 4 L.A.C. (2d) 59 (Schiff); Re Central Canada Potash Co. Ltd. and United Steelworkers, Local 7656 (1975), 10 L.A.C. (2d) 29 (Norman); Re Bell Canada and Communications Workers of Canada (1984), 15 L.A.C. (3d) 27 (Picher); Penticton and District Retirement Service (1977), 16 L.A.C. (2d) 97; Barker-Ellis of Canada Limited (1968), 19 L.A.C. 163 disd; Corning Canada Inc. (1981), 2 L.A.C. (3d) 67 (M.G. Picher) ref'd; Laurentian University Association v. Laurentian University of Sudbury (1979) O.L.R.B. Rep. 767 ref'd.

DECISION: 85-11

Canadian Union of Postal Workers AND Canada Post Corporation

Innis Christie, Abritrator

Wayne Mundle, Darrel Tingley, for the union
Bonnie Boretsky, Hugh Currie, for the employer
Februrary 22, 1985

ISSUE: Jury and Witness Duty 8:3600; Paid Breaks 8:3700; Compliance with the Grievance Procedure 2:3120.

CIRCUMSTANCES: The grievor applied for court leave for a court appearance as defendant and for an appointment with his lawyer. Both were denied but leave for the former was later allowed by the employer for the amount of time the grievor was absent from his job. The grievor claims a full day court leave and special leave for his lawyer's appointment.

The employer concedes the grievor's entitlement to court leave for the time spent away from work but denies a right to a full day's pay for his unexercised rights. Also it makes a preliminary objection to the arbitrator's jurisdiction to hear the grievance re special leave as this was not applied for prior to the arbitration. The union argues that the alteration from court leave to special leave is only a technical matter of little significance.

AWARD: The grievance fails. The grievor cannot claim pay for rights which he did not exercise, there being no duty on the employer to ensure these rights. The employer's preliminary objection succeeds. Requesting special leave at this late date instead of court leave is an attempt to convert this grievance to another matter. The alteration is so substantial so as to be outside the description of the grievance.

AUTHORITIES: Canadian Union of Postal Workers and Canada Post Corporation (St. John's Local) June 25, 1984, CUPW Grievance Nos. A-9-GG-247, 249, 279, 280 and 21; CPC Arbitration Nos. 83-1-3-1423 and 25 and 822, 23, 24 (Christie); Holmes Foundry Ltd. (1973), 4 L.A.C. (2d) 136 (Hinnegan).

DECISION: 85-12

The Corporation of the City of Toronto **AND** The Canadian Union of Public Employees, Local 79

Innis Christie, Chairman; Bradshaw M. W. Paulin; Murray Tate

Harold F. Caley, for the union
John P. Sanderson, Q.C., for the employer
February 22, 1985

ISSUE: Jurisdiction of the Arbitrator 2:0000; Remedial Authority of the Arbitrator 2:1400, Unjust Discharge or Suspension 2:1421, Reinstatement 2:1470.

CIRCUMSTANCES: This grievance was to determine the propriety of reinstatement versus compensation subsequent to a finding of unjust dismissal by the board. The grievor was offered a generous compensatory award but sought reinstatement without loss of pay and benefits. The union argued that the arbitration board does not have jurisdiction to do otherwise but order reinstatement and, alternatively, that if the board has jurisdiction to substitute compensation they ought to refrain from doing so. The employer argued that the grievor ought not to be reinstated.

AWARD: The grievance succeeds and the grievor is reinstated without loss of pay, seniority and benefits. The arbitration board does have jurisdiction to award compensation rather than reinstatement but reinstatement is the appropriate remedy here considering the viability of the employment relationship and the grievor's desire to be reinstated despite the generous compensatory offer. The possibility of there being cause for some discipline was not an important consideration. The grievor was placed in a position as close as possible to that from which he was discharged because the passage of time has made his previous position non-existent.

AUTHORITIES: Hallowell House Limited (1980) O.L.R.B; Hunter Rose Co. Ltd. (1980), 27 L.A.C. (2d) 338 (McLaren); Alberta Educational Communication Corporation (1981), 2 L.A.C. (3d) 135 (Sychuk); Port Arthur Shipbuilding Co. v. Arthurs (1969) S.C.R. 85, 70 D.L.R. (2d) 693; Palmer, Collective Agreement Arbitration in Canada (2nd ed) 1983, pp. 239ff; Re Polymer Corp. and Oil, Chemical, and Atomic Workers International Union, Local 16-14 (1962) S.C.R. 338, 33 D.L.R. (2d) 124; Newfoundland Association of Public Employees v. A. G. Newfoundland (1978) 1 S.C.R. 524, (1977) 75 D.L.R. (3d) 616; Heustis v. New Brunswick Electric Power Commission (1980) 98 D.L.R. (3d) 622; B. C. Central Credit Union, Central Data Systems Department (dec. *f*7/80); Jordan, "The Remedial Authority of the Arbitrator: Revised Labour Relations Board Version", in Labour Arbitration (1981); Lily Cups Limited (1981), 3 L.A.C. (3d) (H. D. Brown); Re Extendicare Limited (St. Catharines) (1981), 3 L.A.C. (3d) 243 (Adams); Kingsway Transports Limited (1982), 4 L.A.C. (3d) 232; Grand Lake Timber Limited (1981), 3 L.A.C. (3d) 264 (Bruce); Re Tenant Hotline and Peter and Gittens (1983), 10 L.A.C. (3d) 130; Beatty, "Labour is not a Commodity: in Swan and Reiter, Studies in Contract Law (1980) p. 313.

DECISION: 85-13

The International Association of Machinists and Aerospace Workers, Lodge 1763 AND Eastern Provincial Airways Limited

Innis Christie, Arbitrator

Lowell Paulson, for the union
Eric Durnford, for the employer
February 18, 1985
ISSUE: Seniority: The Skill and Ability Requirement 6:3000; The Scope of Arbitral Review 6:3100.

CIRCUMSTANCES: Grieved is the denial of a position as storekeeper. The position was given to an employee with less service seniority but more classification seniority, such a distinction being found in the collective agreement. The grievor is deemed by the employer to be a less than average worker but has no formal discipline record. The employer argues that with regard to placement the only relevant type of seniority is classification seniority. The union argues that because applicants come from all classifications to use any basis other than service seniority would be to compare apples with oranges which is unworkable.

AWARD: The grievance fails. As per the collective agreement classification seniority is determinative in the filling of vacancies. As the grievor has no seniority within the classification, issues of whether the company acted in a procedurally unfair manner or that the successful applicant gained his seniority through a temporary placement are not relevant consideration.

AUTHORITIES: The International Association of Machinists and Aerospace Workers and Eastern Provincial Airways, (J. Walsh), June 13, 1972 (Hattenhauer) unreported; The International Association of Machinists and Aerospace Workers and Eastern Provincial Airways (M. Wolthers), 1978 (Hattenhauer) unreported; C.U.P.E., Local 920 and Highland View Regional Hospital (Feb. 5, 1985), unreported (Christie); Westeel Products Limited (1960), 11 L.A.C. 199 (Laskin); Island Telephone Co. Limited (1983), 8 L.A.C. (3d) 132 (Christie); Brown and Beatty, Canadian Labour Arbitration (2nd ed) 1984 para. 6:3100.

DECISION: 85-14

Canadian Union of Postal Workers AND Canada Post Corporation

Innis Christie, Arbitrator

Ted Penney, for the union
V. A. Pylypchuk, for the employer
January 28, 1985

ISSUE: Onus or Burden of Proof 3:2400, Distribution of Overtime 3:2417; Overtime 5:3200, Proprietary Rights to Overtime Assignments 5:3220.

CIRCUMSTANCES: Casual employees were called in to work during a high mail volume situation. Full time employees grieved that this deprived them of overtime to which they had a right pursuant to the collective agreement. The employer argued that the right to overtime is subject to a reasonable limitation and that this referred to requiring adequate rest periods and an assessment of the economic factor of the cost of overtime. Further it argued that the grievor has the onus of proving that the employer did not act reasonably in this context. The union argued that the employees deserved the overtime and that although the collective agreement recognized the requirements of rest periods this was expresaly not a consideration in the determination of overtime allotments.

AWARD: The grievance succeeds in part. In light of the existence of a limitation of reasonableness in collective agreement interpretation and recognizing that the collective agreement excludes rest periods as a condition of overtime allocation, all overtime ought to have been allocated to full time employees except for some rather extreme occasions wherein the lack of rest periods was such that it constituted a reasonable limitation. The onus is on the grievors to show unreasonableness. Economic hardship is not a reasonable limitation as the collective agreement expressly provides for it and implicitly, therefore, recognizes it as a significant component of an employee's income.

AUTHORITIES: Canadian Union of Postal Workers and Canada Post Corporation and Lapointe sub. nom. Gaetan Lapointe v. Public Service Staff Relations Board (1978) 1 F.C. 56; Parnham (CUPW No. W-410-GG583 to 605, CPC No. 82-1-3-513-536) sub. nom. Canadian Union of Postal Workers and Canada Post Corporation (Ken Norman) (J. Bowen), October 28, 1983 (Atla Q.B.); C.U.P.W. and C.P.C. (Moore) (CUPW No. W-460-GG-380 CPC Arbitration No. 83-1-3-1150) (Norman); C.U.P.W. and C.P.C. (Keefe) (CUPW No. A-24-GG-832-838, CPC 82-1-3-2476-2482) November 17, 1983 (Christie).

DECISION 85-15

Berwick Bakery AND United Food and Commercial Workers, Local 1157

Bruce Outhouse, Arbitrator

Thomas Bradshaw, for the union
Matthew McPherson, for the employer
March 8, 1985

ISSUE: Retroactivity 4:1610, The Object of Construction: The Intention of the Parties 4:2100; Qualifying for Medical and Disability Benefits 8:3320.

CIRCUMSTANCES: The grievance arises from the provisions of a first collective agreement, dated August 7, 1984, relating to the number of days of paid sick leave to which the grievor was entitled after August 7, 1984. The agreement provides for a maximum of four days of paid sick leave in a calendar year. The employer argued that after August 7, 1984,

all employees were entitled to no more than two days of paid sick leave, arrived at by pro-rating the days of sick leave allowable in a year over the remaining months of 1984. The grievor was off sick for three days in September 1984.

AWARD: Award pending. As paid sick leave entitlement is tied directly to the calendar year, the grievor is entitled to four days of sick leave in 1984, taken at any time during the year, either before or after the signing of the collective agreement. Whether or not sick leave pay should be awarded for the day in question depends upon the number of days of paid sick leave the grievor had taken prior to the absence in September 1984.

AUTHORITIES: Re International Chemical Workers, Local 412, and Penick Canada Limited (1966), 17 L.A.C. 296 (Weatherill); Re Sturgeon General Hospital and Canadian Union of Public Employees, Local 1335 (1974), 6 L.A.C. (2d) 360 (Taylor); Brown and Beatty, Canadian Labour Arbitration, (2d), p.183-184.

DECISION 85-16

Canso Sea Products Limited AND United Food and Commercial Workers, Local 1252

Bruce Outhouse, Arbitrator

William Parson, for the union
Donald McDougall and Nancy Murray, for the employer
March 4, 1985

ISSUE: The Object of Construction: Intention of the Parties 4:2100; Refusal to Follow Instructions 7:3610; Essential Ingredients 7:3612; Warnings 7:4416; Discharge Distinguished 7:7000; Resignation 7:7100.

CIRCUMSTANCES: The grievor had been put ashore following an altercation with the captain while at sea. The grievor did not object to being put ashore, and was formally dismissed shortly thereafter. The grievor claims that he was unjustly dismissed, and asks to be reinstated with full compensation. The employer states that the grievor refused to obey orders, that there was just cause for dismissal, or, alternatively, that by going ashore without objection the grievor had quit. The employer argues it acted within the provisions of the collective agreement.

AWARD: The grievance fails. Based upon evidence at trial, the grievor had refused to obey orders. The employer did not breach the collective agreement by dismissing the grievor. The other arguments were not considered.

AUTHORITIES: Dairy Producers Co-operative Limited v. Lyons et al (1982), 132 D.L.R. (3d) 1 (S.C.C.); Valley Rite-Mix Limited v. Teamsters Local Union 213, (1975) 1 W.W.R. 685 (B.C.C.A.); Re Hamilton Street Railway Company and Amalgamated Transit Union, Division 107, 22 D.L.R. (3d) 658 (Ont. H.C.).

DECISION 85-17

Pioneer Coal Limited AND United Mine Workers of America, District 26

Judge J. A. MacLellan, Arbitrator

Roddie Lee, for the union
Glen Dexter, for the employer
March 11, 1984

ISSUE: The Object of Construction: The Intention of the Parties 4:2100; Acquisition and Termination 6:1100; Recall of Persons on Layoff 6:2354; Measurement of Probationary Period 7:5010.

CIRCUMSTANCES: The grievor had worked for the company for twenty-four eight hour days, and was paid for additional periods of four hours on seven additional days between November 28, 1983, and February 2, 1984. He was not rehired until October 17, 1984. The grievor was laid off between February 2 and February 9, 1984, returning to work on February 9, 1984 for one shift only. The grievor claims that he had completed the probationary period specified in the collective agreement and was entitled to have been placed on the seniority list with an effective date of November 28, 1983. The grievor claims that he should have been rehired before October 17, 1984. The company claims that the grievor had not completed the probationary period of "a total of thirty (30) days within a twelve (12) month period."

AWARD: The grievance succeeds. The collective agreement gives "days" and "working days" different meanings. The grievor had completed a probationary period of thirty days and should have been placed on the seniority list. The grievor should have been rehired earlier, but as there is little evidence that suitable work was available when the company began rehiring in June 1984, compensation is awarded for the period of August 20 to October 17, 1984 only.

DECISION 85-18

Pioneer Coal Limited AND United Mine Workers of America, District 26

Judge J. A. MacLellan, Arbitrator

Roddie Lee, for the union
Glen Dexter, for the employer
March 11, 1985

ISSUE: Promissory Estoppel 2:2200; Job Posting 5:2520, 6:2310; Promotion, Demotion and Transfer 6:2100; Ability and Qualifications Criteria 6:3300.

CIRCUMSTANCES: The grievor asked his supervisor about transfer to a new job which the grievor had heard about "through the grapevine". The new job was never posted as required by the collective agreement and the grievor was not accurately informed about the nature of the job or the work it involved. The grievor's qualifications and record were

considered, and it was decided that a less senior employee, who had already begun the new job, was more qualified for it. The grievor claims that he was not fairly considered for the new job. The company states the grievor was fairly considered, and further that the union is estopped from pleading a breach of the collective agreement regarding the failure to post the job by its previous failure to complain over similar instances of non-posting.

AWARD: The grievance succeeds. There was no clear conduct such as to induce the company to believe the union's rights would not be enforced over the failure to post a job. The grievor was not fairly considered for the new job, as he was not accurately informed about it, nor was he questioned about his ability to do the work involved. Compensation to be agreed between the parties.

DECISION 85-19

Pioneer Coal Limited AND United Mine Workers of America, District 26

J. A. MacLellan, Arbitrator

Ralph Jobes, for the union
Glen Dexter, for the employer
March 11, 1985

ISSUE: Interpretation of the Collective Agreement 4:2000; Layoff 6:2200; Skill and Ability 6:3000.

CIRCUMSTANCES: The grievor and another employee with less seniority both performed the same job. The grievor was laid off, while the other employee was kept on. The grievor claims that as senior employee, he should have been kept on. The company claims it acted within the provisions of the collective agreement which provide that employees of less seniority may be kept on over more senior employees for reasons of "skills, experience, and efficiency" displayed by the less senior employee.

AWARD: The grievance is dismissed. Although the evidence failed to show the grievor was an unsatisfactory employee, it was shown that the less senior employee was more productive and more skilled at performing the work than the grievor. The company cannot be faulted for retaining a more skilled employee.

DECISION 85-20

Department of Highways of Nova Scotia AND The Canadian Union of Public Employees

S. Bruce Outhouse, Chairman; Norm Herbert, Gregory S. North

N. Blaise MacDonald, for the union
Bruce E. Davidson, Q.C., for the employer
February 13, 1985

ISSUE: Probationary Employee, Right to Grieve 7:5000, 7:5020, Arbitrability, Probationary Employee 7:5020; Adjournments 3:2300.

CIRCUMSTANCES: The grievors were members of a work group and were normally laid off in the fall and rehired the following spring. They were not recalled in 1982 as their work group was reduced due to budget cuts. Likewise they were not recalled in 1983. They had lost seniority status due to the twelve months without work but were still employees, though of probationary status. The grievor successfully grieved the hiring of students in 1983, claiming they ought to have been recalled. They were subsequently notified by letter of termination as no increase in the size of the their work group was foreseen. After a second letter clarified the first they grieved their dismissals.

The employer argues that matter is inarbitral due to the bar in the collective agreement concerning grievances of probationary employees' discharge. The Board rejected the request for bifurcation.

The union argues the dismissals are nullities as not complying with notice requirements, that the matter is outside the bar in the collective agreement, and that the dismissals were made in bad faith.

AWARD: The grievance fails. While the first letter of the employer did not comply with the collective agreement, it is not even necessary to deal with the mandatory directory distinction. The bar in the agreement deals with "discharge". The Board cannot accept the discharge/termination distinction put forth by the union in light of the language of the agreement. Nothing suggests that 'discharge' is restricted to grounds of suitability, with 'termination' dealing with nonculpable matters. The allegations of bad faith are not made out as the evidence supports the conclusion that budgetary concerns motivated the decreased work force. While the employer may have had a policy of discharging laid off probationary employees for administrative reasons this in itself is not bad faith though it might prevent the completion of the probation period. The Board does not deal with whether bad faith would be sufficient grounds for review in the face of the bar (the bar stands here as s. 40(1) Trade Union Act does not apply to the Crown).

The Board argues that the test for bifurcation is the balance of convenience but feels that unless the preliminary objection is simple enough to dispose of immediately then the decision should be reserved and the case proceed on the merits.

ADDEMDUM OF GREGORY S. NORTH: While agreeing with the Board in result, I feel it is better to consider each preliminary objection on its own merits and not lay down a general rule.

AUTHORITIES: Trade Union Act, s. 40(1); International Association of Firefighters, Local 268 v. City of Halifax (1982), 50 N.S.R. (2d) 299 (N.S.S.C.A.D); William Roberts (July 30, 1982, unreported arbitration N.S.); Thomas Metten and Stephen Davidson (October 25, 1982, unreported arbitration N.S.); Webster's New World Dictionary, Second College Edition (1976); Brown and Beatty, Canadian Labour Arbitration (2d).

DECISION 85-21

Nova Scotia Power Corporation AND Canadian Brotherhood of Railway, Transport and General Workers, Local 507

Judge Robert F. Ferguson

Bernard Boudreau, for the union
Gregory North, for the employer
February 15, 1985

ISSUE: Overtime-Management Rights 5:3210, Right to Claim 5:3220, Scheduling 5:3100, 5:3200.

CIRCUMSTANCES: The union grieves the failure to call the grievor in to work overtime to replace a scheduled employee who failed to show. The collective agreement requires the employer to use a particular system to decide who will replace a scheduled employee when such a replacement is required. This would have been the grievor but no employee was called as a replacement.

The union argues that the agreement requires the employer to replace a scheduled worker who does not show and that past practice establishes that a five man crew is required (only four worked the shift in question).

AWARD: The grievance fails. Evidence is insufficient to support the claim of past practice. Management retains the right to schedule work under this agreement. Before the provisions on call-in operate a replacement must be required, here the employer decided no replacement call-in was required and therefore no rights under the call in provisions were violated as that provision was never required to be referred to.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d); Palmer, Collective Agreement Arbitrations in Canada.

DECISION 85-22

Banner Electrical Contractors Limited AND International Brotherhood of Electrical Workers, Local 625

Milton J. Veinot, Arbitrator

Fern Tardif, for the union
Paul Miller, for the employer
March 18, 1985

ISSUE: Union-Security-Remedies-Damages 2:1426; Remedies-Union Security-Damages 2:1426.

CIRCUMSTANCES: The union was certified as bargaining agent for the employees of the employer on December 5, 1984. The employer appealed but his appeal was dismissed by the Construction Industry Panel on February 17, 1985. In the interim the employer refused to follow the collective agreement concerning union security. The breach is admitted but the amount of damages is disputed.

AWARD: The different groups of employees were dealt with individually and jurisdiction was reserved concerning any problems with the calculations.

For union members employed during the period but not paid union scale the difference between the wage packages of $6,851.25 is awarded to the union upon the undertaking to distribute it to the employees.

For one non-union employee employed before and after certification the total wage package from December 19 to February 17 of $1,840 is awarded. The union only claimed from December 19 which was the time the employee refused to join the union to the date of his discharge.

For the non-union employee hired after certification the differential in wage packages is awarded ($513.38). Only the differential is awarded because he was refused membership in the union at that time because he was working during this dispute. He has subsequently been admitted to the union. It cannot be said the employer caused any more damage than the differential.

For non-union workers hired after December 5 doing a mix of residential construction and commercial/industrial work the total wage package of $5,768.04 is awarded. This amount does not include an award for work on residential construction as the parties agree that is not covered by the certification order.

For non-union workers hired after December 5 working solely on commercial/industrial projects the total wage package of $9,457.15 is awarded.

AUTHORITIES: Re United Brotherhood of Carpenters and Joiners of America, Local 1392 and MacCougall Construction Limited (December 6, 1982, F. B. William Kelly); Re International Brotherhood of Electrical Workers, Local 625 and Mersey Electrical and Contracting Limited (May 15, 1984 - Eric Dumont); Blouin Drywall Contractors (1973), 4 L.A.C. (2d) 534 (O'Shea) reversed, 48 D.L.R. (3d) 191, restored, 57 D.L.R. (3d), 199; Brown and Beatty, Canadian Labour Arbitration (2d).

DECISION 85-23

The Governors of Dalhousie College and University AND Canadian Union of Public Employees, Local 1392

Bruce Outhouse, Chairman; James Kenley, Clarence Ivey

Ray Hill, for the union
Eric Durnford, for the employer
March 20, 1985

ISSUE: Wages, Compliance with Wage Structure 5:2400, Job Classification and Description, Creation or Revision 5:2440.

CIRCUMSTANCES: The grievor was called on to do the work of another employee who was in a different classification receiving a higher wage. The grievor claims he is entitled to this higher wage which he was not paid. The grievor is a heavy cleaner. The position he filled was that of caretaker. As of 1979 there has been no difference in duties between the classifications due to a reorganizing of the work force. The employer has kept the old caretakers on at the higher wage even though they do only heavy cleaner work. In effect the position was red circled.

The union argues that the grievor was assigned to a position with a higher rate of pay and is therefore entitled to the differential as there is no express red circling in the agreement to restrict his entitlement. The employer argues that as the grievor performed the same work he was not assigned to a different position regardless of the fact the work was normally done by an employee of a different classification.

AWARD: The grievance fails. The two positions are exactly the same. There is no difference in function. As such the grievor does not fall within the terms of the entitlement to the higher wage which only is effective upon moving to a different "position". Position is defined by job content not the classification of the employee performing it. Any other decision would force the employer to hire new caretakers as the old ones retired to do the job of a heavy cleaner which is a clearly unreasonable result.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2d).

DECISION 85-24

The Governors of Dalhousie College and University AND Canadian Union of Public Employees, Local 1392

Judge J. A. MacLellan, Chairman; James Henley, Gregory S. North

Ray Hill, for the union
Wylie Spicer, for the employer
March 15, 1985

ISSUE: Innocent Absenteeism 7:3210

CIRCUMSTANCES: The grievor grieves his dismissal. Prior to this time the grievor had demonstrated a history of being unable to regularly attend work on time. The grievor lives approximately sixty miles away and has no driving privileges. As such he has to rely on a neighbor for a ride and even with an adjustment in his hours he is frequently late. The employer has raised the matter with the grievor and in the course of three letters made it clear further breaches would be dealt with severely.

AWARD: The grievance fails. The employer has demonstrated that the grievor was frequently late, much more so than any other employee. Warnings have not changed the behaviour. The employer is entitled to rely on past behaviour as indicative of the future unless the grievor can raise some reason leading to the conclusion that the future will be different. This the grievor has failed to do. The Board recognized that the grievor has diligently and honestly tried to be on time but the transportation difficulties are at present insurmountable as the grievor will not have a driver's license in the near future.

DECISION: 85-25

Maritime Telegraph and Telephone Company Limited AND Atlantic Communications and Technical Workers' Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
Gregory I. North, Terry L. Roane, for the employer
April 1, 1985

ISSUE: Interpretation: Aids to Interpretation, Prior Awards and Court Decisions 4:2220; Job Posting 6:2310; Skill and Ability: Arbitral Review 6:3100, Skill and Ability: Arbitral Review-Senior Employee if Relatively Equal 6:3220, Skill and Ability: Criteria of Ability and Qualifications -Aptitude 6:3330.

CIRCUMSTANCES: A position for which the grievor had applied was awarded to an employee with less seniority. The grievor maintains that according to the terms of the collective agreement, as ability, qualifications and seniority were relatively equal, the employer has breached the collective agreement by awarding the position to the less senior employee.

AWARD: The grievance is dismissed. Although management discretion in evaluating applicants is not explicity stated, to deny it would require the arbitrator to 'second-guess' management. So long as the employer acted fairly, reasonably, honestly and used appropriate standards, the correctness of its decision should not be impugned. Ability, qualifications and seniority were considered as a package; the employee who was awarded the position was considered to have greater aptitude. The 'packages' were not considered to be relatively equal.

AUTHORITIES: Canadian Food and Allied Workers, L 175 v. Great Atlantic and Pacific Co. of Canada Ltd. et al, 76 C.L.L.C. 14 (Ont. Div. Ct.); Brown and Beatty, Canadian Labour Arbitration, 2d ed., 1984, p. 298, pp. 301-02, pp. 303-04, p. 305; Re University of Toronto and C.U.P.E., Local 1230 (1979), 24 L.A.C. (2d) 97, (Burkett); Re British Columbia Housing Management Commission and Service Employees International Union, Local 224 (1977), 15 L.A.C. (2d) 121, (Weiler); Telephone Plant Workers of Prince Edward Island, Local Union 1030 of International Brotherhood of Electrical Workers, (Ellis) v. Island Telephone Company Ltd., unreported, May 11, 1982, (Collier); Re Island Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983), 8 L.A.C. (3d) 132, (Christie).

DECISION: 85-26

City of Halifax AND Halifax Civic Workers' Union, Local 198

R. Lorne MacDougall, Chairman; Eric B. Durnford; Joseph W. Ross

Charles A. MacDougall, for the union
Gerald J. Goneau, for the employer
March 5, 1985

ISSUE: Company Rules 4:1500; Discipline and Discharge: Grounds For - Leaving Work Without Permission 7:3130.

CIRCUMSTANCES: The grievor was given a five days' suspension, later reduced to a one day suspension, on the grounds that he had left his assigned work area without permission. The grievor believed that he was working in areas covered by his assigned work area. The work areas were not described in writing or on a map.

AWARD: The grievance succeeds. The employer was unable to prove that the grievor knew the geographical limits of the area assigned to him or that he should have known what his task was in that respect. The grievor is to be compensated for one day's suspension and any documentation relating to this matter is to be removed from the grievor's personnel file.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2d ed), 1984, p 182.

DECISION: 85-27

Allstate Plumbing and Heating Limited AND United Association of Journeymen and Apprentices of the Plumbing, Steamfitting and Pipefitting Industry of the United States and Canada, Halifax Local Union No. 56

William H. Kydd, Arbitrator

Ray Larkin, for the union
Brian Johnston, for the employer
March 29, 1985

ISSUE: Collective Agreement: Binding Effect-Determination of 4:0000; Work Assignment: Contracting Out:-Employees Outside Unit 5:1400; Remedies: Type of Grievance-Work Assignment Outside Unit 5:1500.

CIRCUMSTANCES: The union was certified on January 11, 1985 as bargaining agent for a bargaining unit consisting of all employees of the employer engaged as plumbers and plumbers' apprentices on mainland Nova Scotia. The union had a pre-existing collective agreement with the Construction Association Management Labour Bureau Limited, the exclusive bargaining representative for employers in the industrial and commercial sector of the construction industry in Halifax. The employer is not a member of the Construction Association Management Labour Bureau Limited. After certification of the union, the employer did not comply with the collective agreement in that it did not adjust its wage rates.

The union claim is in four parts relating to four employees. Three of these employees are union members who have not received any increases in wages or benefits as per the collective agreement schedules. The fourth employee was not a union member, alledgely employed in contravention of the collective agreement as there were union members available to do that work. The union claims damages in each instance.

AWARD: The grievance succeeds. The employer is engaged in the construction industry in the sector and area covered by the Accreditation Order No. 392 and is therefore bound by the collective agreement entered into by the Construction Association Management Labour Bureau Limited and, inter alia, the union. The employer is ordered to pay damages in respect of each of the four claims made by the union. It is further ordered that the employer comply with the provisions of the collective agreement.

AUTHORITIES: Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 8 O.R. (2d) 103, (Ont. C.A.), Burrard Yarrows Corporation and Brotherhood of Painters (1981), 30 L.A.C. (2d) 331.

DECISION: 85-28

CKF Inc. AND Canadian Paperworkers Union, Local 576

R. J. Downie, Chairman; John Kane; Eric Durnford

Denis Grant, for the union
John D. Plowman, Karin McCaskill, for the employer
January 22, 1985

ISSUE: Estoppel: Condonation 2:2200; Collective Agreement: Form and Content-Ancillary Documents, Supplementary Agreements 4:1200; Interpretation: Context 4:2300; Management Rights 5:0000; Working Hours and Shifts: Reduction of Hours 6:2210.

CIRCUMSTANCES: In 1982 and again in 1983 the employer, the union and the Canada Employment and Immigration Commission entered into Work Sharing Agreements to share available work between the employees in order to prevent any employee being totally laid off. A Memorandum of Agreement dated October 19, 1982 was agreed to by the parties, and is relevant to the 1983 Work Sharing Agreement.

In a week in October 1983, four employees who were on vacation were not replaced by alloting their shifts to other employees. It was not the employer's practice to fill in for vacationing employees. A similar situation had arisen in 1982, but had not been grieved.

The union contends the employer was obligated by the Memorandum of Agreement to provide a minimum number of shifts per week, which it failed to do when it did not reallocate the shifts of the vacationing employees. The employer argues that the union is estopped from raising this grievance because it did not proceed with the previous complaint in 1982, and that it is under no obligation to guarantee minimum amounts of work or of employees per department, and that it was within the management rights accorded it under the collective agreement which exists between the parties in not replacing vacationing employees and in its sole determination of the amount of available work.

AWARD: The grievance is dismissed. Promissory estoppel does not apply. The Memorandum of Agreement does not guarantee any minimum amount of work, nor does it impinge upon management's right to decide how much work is available. Under the Memorandum of Agreement the union has the right to participate in the scheduling of the work, but not in management decisions.

AUTHORITIES: Annapolis Regional Schools and the Nova Scotia Teachers Union, unreported, June 18, 1981 (MacDougall); Brown and Beatty, Canadian Labour Arbitration, (2d ed), 1984, p. 105; Palmer, Collective Agreement Arbitration in Canada (2d ed), p. 212ff; C.U.P.E., and City of Sudbury, Arbitration 15 L.A.C. 403.

DECISION: 85-29

Nauss Brothers Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

Milton J. Veinot, Arbitrator

Ronald A. Pink, for the union
H. W. Milner, for the employer
April 15, 1985

ISSUE: Procedure: Stipulation of Agreed Facts 3:2610; Board of Arbitration: Discretion-Evaluation of Evidence 3:5100; Collective Agreement: Binding Effect-Determination of 4:0000.

CIRCUMSTANCES: The issue for arbitration was whether or not the employer was bound under the binding provisions of the accreditation legislation in the Trade Union Act to comply with a collective agreement between the union and the Construction Association Management Labour Bureau Limited. The employer was not a member of that organization.

Concurrent proceedings were before the Nova Scotia Labour Relations Board, and later the courts on an application for certiorari, in an attempt to overturn the original certification order certifying the union as bargaining agent for certain of the employer's carpenters. A motion for adjournment based on these concurrent proceedings and a subpoena, and a motion objecting to the jurisdiction of the Board were dealt with before proceeding to the central issue of the arbitration.

AWARD: The grievance succeeds. Both motions were dismissed. The employer is bound by the provisions of the collective agreement by virtue of the "binding" provisions of the accreditation legislation in the Trade Union Act. The matter was then remitted to the parties for resolution of details on the number and nature of jobs in the sector concerned to which the agreement would apply, and all financial and record aspects of the matter. The arbitrator retained jurisdiction to hear the parties, in the event of any disagreements or unresolved problems.

AUTHORITIES: International Association of Firefighters, Local 268 v. City of Halifax (1982), 50 N.S.R. 299, (App. D); Lunenburg Police Association v. Town of Lunenburg (1980), 42 N.S.R. (2d) 657, (App. D).

DECISION: 85-30

Volvo Canada Limited AND United Automobile Workers of America, Local 720

Bruce Outhouse, Arbitrator

Leonard Harrison, for the union
John Merrick, for the employer
April 12, 1985

ISSUE: Job Classification and Description: Creation or Revision-Changes of Workload/Job Function 5:2410.

CIRCUMSTANCES: The employer operates an automobile assembly plant. It has assigned bargaining unit employees to install audio systems in vehicles. These employees were classified as "assemblers". The union argues that the installation of audio systems is not within the scope of the "assemblers" classification, but belongs to the higher-rated "adjuster" classification. The employer argues that it has not breached the collective agreement by substantially altering the work involved in the "assemblers" classification, and that the work properly fits within the scope of that classification.

AWARD: The grievance is dismissed. It is a question of fact whether a new classification has been established or an existing one substantially modified. The "assembler" classification is a broad one and the installation of audio systems can fit within it. There is no justification for allocating the work to the higher-rated "adjuster" classification, although, in the opinion of the arbitrator, it could properly be allocated to the equally-rated "sub-assembler" classification.

DECISION: 85-31

St. Rita Hospital AND The Canadian Brotherhood of Railway, Transport and General Workers, Local 706.

T. Bernard Boudreau, Arbitrator

Thomas Barrow, for the union
Robert Cook, for the employer
April 9, 1985

ISSUE: Interpretation: The Intention of the Parties 4:2100; Statutory Holidays: Holiday Pay and Other Benefits-Sick Leave Benefits 8:3123, 8:3330.

CIRCUMSTANCES: The grievor was off work on Workers' Compensation following an on-the-job injury. The grievor was not paid for two statutory holidays which occurred during this period. The collective agreement provided that employees on leave of absence without pay should not receive statutory holiday pay. The grievor is therefore claiming two days holiday pay as she was not on leave of absence without pay.

AWARD: The grievance succeeds. The explicit delination of one exception to the general rule implies that there are no other exceptions: only employees on leave of absence without pay can be denied holiday pay.

AUTHORITIES: Charlton Transport Ltd. (1972), 24 L.A.C. 30; York Farms Division of Canada Packers (1970), 21 L.A.C. 188.

DECISION: 85-32

New Waterford Consolidated Hospital AND Canadian Brotherhood of Railway, Transport and General Workers Union, Local 604

Frank L. Elman, Arbitrator

Thomas Barron, for the union
Robert Cook, for the employer
April 17, 1985

ISSUE: Interpretation: Intention of the Parties 4:2100; Statutory Holidays: Work on Day of Holiday 8:3130, Holiday Pay and Other Benefits 8:3140.

CIRCUMSTANCES: The grievor worked a scheduled shift on a statutory holiday. Under the terms of the collective agreement the employer is required to compensate the grievor in one of three alternative ways - by paying time plus one-half for the hours worked on the holiday, or by giving the employee a paid holiday on the working day immediately following the employee's vacation, or by giving the employee some other mutually agreed upon day as a paid holiday.

The employer originally offered time plus one-half, but later reneged and offered instead another mutually agreed day as holiday. The grievor has not agreed to another day and seeks time plus one-half. The employer argues that the discretion is management's and that an employee cannot frustrate the employer's choice by refusing to agree upon another day. The union contends that if another day cannot be mutually agreed to, the employer must then select one of the remaining two methods of compensation.

AWARD: The grievance is dismissed. The employer has the discretion to select the method of compensation for an employee who has worked on a statutory holiday. The employer and the grievor are to select another day as provided in the collective agreement. The employer may have been in error in first promising time plus one-half and later changing its offer, but there is no evidence of bad faith or discrimination.

AUTHORITIES: Employee's Local 2336 and VS Services (Food Management Services), unreported, August 27, 1984, (Outhouse).

DECISION: 85-33

Metropolitan Transit Commission AND Amalgamated Transit Union, Local 508

T. A. Cromwell, Arbitrator

Ronald Pink, for the union
A. W. Cox, for the employer
April 16, 1985

ISSUE: Company Rules 4:1500; Interpretation: The Intention of the Parties 4:2100; Wages: Overtime Pay 8:2100.

CIRCUMSTANCES: The employer requires its employees to file accident and incident reports as necessary, but does not allot a specific time during a shift for the preparation and filing of such reports. The collective agreement provides that one hour relief time or pay is to be allowed employees "required to report in connection with the investigation of claims or accidents". The union therefore claims that an employee who is unable to complete a required report during regular working hours is entitled to one hour's pay. The employer argues that the specific provision described refers to personal appearances and not to written reports. The employer states further these accident and incident reports are within the usual reporting duties of its employees, which form part of their routine work and for which time is alloted at the end of every shift.

AWARD: The grievance fails. The provision for the filing of "reports, etc." at the end of a shift includes the filing of accident and incident reports. The use of the verb "to report" within the mentioned Article indicates that the provision for one hour's relief or pay is applicable only where the employee is required to be physically present to report for an interview or other appearance related to the investigation of a claim or accident.

DECISION: 85-34

F. A. Tucker (Atlantic) Limited AND International Brotherhood of Electrical Workers, Local 1928

Bruce Outhouse, Arbitrator

Gerald McConnell, for the union
Terry Roane, for the employer
April 18, 1985

ISSUE: Estoppel 2:2200; Interpretation: The Intention of the Parties 4:2100; Work Assignment: Contracting Out-Employees Outside Unit 5:1400; Remedies: Type of Grievance-Work Assignment Outside Unit 5:1500.

CIRCUMSTANCES: The employer hired a former employee who was not a union member and who was not referred by the union office. The union argues that this was a breach of the collective agreement, and that the employer should have hired the grievor, who was at the top of the union's "out-of work" list at that time. The employer argues that the collective agreement refers to "new" employees only and the direct rehiring of a former employee, without giving the union an opportunity to fill the position, is not a breach of the collective agreement. The employer also argues the union is estopped by its previous acceptance of the employer's past practice of directly hiring employees.

AWARD: The grievance succeeds. Estoppel does not apply given the evidence of the union's position on the employer's practice of direct hiring during the previous round of collective bargaining. The collective agreement does not provide for seniority or recall rights, and the conclusion is that the parties have agreed to a union referral system. The word "new" in the clause under consideration cannot therefore mean 'first-time' employee without contradicting the intent to establish a union referral system. The employer's obligation to clear employees with the union gives the union the power to prevent hiring of non-members. The grievor is to be compensated at the appropriate rate for the amount of time the non-union member worked, less any amount the grievor earned during that period.

AUTHORITIES: Re Northern Telecom Canada Ltd. and United Automobile Workers, Local 27 (1981), 2 L.A.C. (3d) 105 (Burkett); Re Andres Wines (B.C.) Ltd. and United Brewery and Distillery Workers, Local 300 (1977), 16 L.A.C. (2d) 422 (Weiler); Re T.C.F. of Canada Ltd. and Textile Workers Union of America, Local 1332 (1972), 1 L.A.C. (2d) 382 (Adell); Re Hallmark Containers Limited and Canadian Paperworkers Union, Local 303 (1983), 8 L.A.C. (3d) 117 (Burkett); Re Lake Ontario Cements Limited and United Cement, Lime and Gypsum Workers International Union, Local 387 (1984), 13 L.A.C. (3d) 1 (Picher).

DECISION: 85-35

The Nova Scotia Civil Service Commission AND The Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, Kim Turner, for the union
Reinhold Endres, Alison Scott, for the employer
March 20, 1985

ISSUE: Interpretation: Intention of the Parties 4:2100; Job Classification and Description: Creation or Revision-Change of Work Load/Job Function 5:2410.

CIRCUMSTANCES: The grievor is a 'stenographer II'. During the period between the retirement of the previous Zone Controller and the appointment of a new Zone Controller, the grievor claims to have performed the duties of the Zone Controller and therefore to be entitled to acting pay as provided for in the collective agreement. The employer set out four arguments why the acting pay provisions do not apply to this case, all of which were considered at the request of the parties. These arguments (not in order) are that the grievor was not "designated" to perform as a Zone Controller as required by the provisions of the collective agreement; that the grievor did not perform the "principal duties" as required by the provisions of the collective agreement; that the temporary vacancy contemplated in the acting pay provisions must be due only to the temporary absence of the incumbent, and not the retirement, resignation, or death of the incumbent, in which case the issue would be reclassification and not acting pay; and finally that the acting pay provisions apply only to positions within the same bargaining unit, and do not give cross-unit rights.

AWARD: The grievance is dismissed. Although the grievor can be said to have been designated to perform the routine office functions of a Zone Controller, the grievor did not perform the principal or core duties of the Zone Controller, which are not office duties. The collective agreement does not specify any reason for the temporary vacancy contemplated by the acting pay provisions, and can therefore include vacancies resulting from death, retirement, resignation, leave of absence or other cause. The collective agreement clearly indicates that cross-bargaining unit rights are not contemplated by the present acting pay provisions.

AUTHORITIES: Re Fairview Nursing Home Inc. and London and District Service Workers Union, Local 220 (1983), 9 L.A.C. (3d) 342; Nova Scotia Government Employees Union (King and Morgan) and Civil Service Commission, unreported, June 27, 1983 (Outhouse).

DECISION: 85-36

The Nova Scotia Civil Service Commission AND The Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
Alison Scott, for the employer
March 8, 1985

ISSUE: Evidence: Burden of Proof-Skill and Ability 3:2413; Remedies: Type of Grievance-Work Assignment Outside Unit 5:1500; Fairness: Job Posting 5:2300; Job Posting: Fair and Reasonable 5:2520; Skill and Ability: Arbitral Review-Senior Employee if Relatively Equal 6:3220; Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: A position for which the grievor had applied was awarded to a person with no seniority. The grievor claims that as she is equally qualified, the position should have gone to her as senior employee by the terms of the collective agreement.

AWARD: The grievance is allowed. The grievor was able to demonstrate that she had all of the qualifications described in the job posting and that she is as well qualified as the person awarded the position. It is therefore up to the employer to show at least that it did not act in a manner that was arbitrary, discriminatory, unreasonable or male fides. The employer is unable to do this; indeed, the evidence indicates unfair and unequal treatment of the grievor throughout the entire process. The position was awarded to the grievor.

AUTHORITIES: Civil Service Commission v. N. S. Government Employees Union (Francine Vermeulen), unreported, May 8, 1984 (Darby); Brown and Beatty, Canadian Labour Arbitration, (2d ed) 1984, p. 309, pp. 301-02, p. 328; N. S. Government Employees Union (Pettipas) v. Civil Service Commission, unreported, July 20, 1984, (Outhouse); Lady Galt Towels (1969), 20 L.A.C. 382 (Christie); American Cyanamid Co. v. Ethicon Ltd. (1975), A.C. 396 (H.L.(E.)); N. S. Government Employees Union (Keefe) and Civil Service Commission, unreported, October 5, 1981, (Outhouse).

DECISION: 85-36A

Nova Scotia Government Employees Union AND Nova Scotia Civil Service Commission

Honourable Chief Justice Glube, Supreme Court of Nova Scotia, Trial Division, in Chambers

Raymond Larkin, for the union
Alison Scott, for the employer
May 22, 1985

ISSUES: Judicial Review of Grievance Arbitration 1:5000, Enforcement of Awards 1:5800.

CIRCUMSTANCES: This was an application made by the union pursuant to s.14 of the Arbitration Act to enforce an arbitration award whereby it was ordered that the Commission had to place the grievor in a prescribed secretarial position. The Commission had not complied with the order but rather, after 27 days, had commenced an action to set aside the arbitrator's decision arguing that the arbitrator did not have the discretionary jurisdiction to make such an order and further that the decision was based upon an interpretation which the collective agreement could not reasonably bear. The union argued that the appropriate way to dispense of the matter was by a summary proceeding and that the Commission was really attempting to obtain a stay of proceedings.

AWARD: The summary order was granted. Summary proceeding is generally the appropriate manner by which to deal with the enforcement of arbitral decision, the "action" method ought to be reserved for very contentious cases only. Considering the equities of the situation, notably the time lapse without action by the Commission, the order is granted. No determination is made upon the argument that the Commission is seeking a stay of proceedings as that application was not made here but might be made at a later date.

AUTHORITIES: Arbitration Act, R.S.N.S., 1967, c.12, s.14; Civil Service Collective Bargaining Act, S.N.S. 1978, c.3, s.38(2); Middelemiss & Gould v. Hartlepool Corp. (1973) 1 All E.R. 172; Re Boks & Co. and Peters, Rushton & Co. Ltd. (1919) 1 K.B. 491; Re Regina City Policemen's Association and Board of Police Commissioners of the City of Regina, et al, 24 D.L.R. (3d) 41.

DECISION: 85-37

The Nova Scotia Civil Service Commission AND The Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
Reinhold Endres, Janice Forsyth, for the employer
February 27, 1985

ISSUE: Evidence: Burden of Proof 3:2400; Illness or Disability: Burden of Proof-Qualifying for Benefits 8:3320.

CIRCUMSTANCES: The grievor claims to be entitled to have been placed on special leave with pay after sustaining an injury in the performance of her duties, as provided for in the collective agreement. The injury is described as "teacher burn-out", and is a psychic, not a physical injury. The grievor has a history of personal and medical, as well as some professional problems.

The employer has rejected the grievor's claim on the basis that 'burn-out' is not an injury at all, or at least not an injury as contemplated by the collective agreement, and further argues that the grievor, if she did sustain such an injury, did not sustain it in the course of her duties.

AWARD: The grievance is dismissed. The grievor is unable to prove on a balance of probabilities that the psychic injury she sustained was due primarily to work-related causes.

The decision contains a detailed discussion of psychic injuries such as 'burn-out' and the appropriate standards of proof for establishing a causal relationship between the injury and work, with particular reference to other casual factors and cumulative effects. It was the decision of the arbitrator that psychic injury is clearly within the meaning of "injury" in the appropriate provisions of the collective agreement.

AUTHORITIES: The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1981 Vol. II, p. 3210; The American Heritage Dictionary of the English Language, Amer. Heritage Publ. Co. Inc., 1969, p. 1305; Diagnostic and Statistical Manual, 3rd ed. 1978; Norman H. Fergusson, Stress and the Nova Scotia Teacher, Nova Scotia Teachers Union, 1984.

DECISION: 85-38

Glades Lodge Limited AND The Canadian Union of Public Employees, Local 1259

N. M. Scaravelli, Chairman; Eric Durnford; Raymond Larkin

N. Blaise MacDonald, Rose Ann MacGillivray, for the union
Terry L. Roane, for the employer
March 7, 1985

ISSUE: Discipline and Discharge: Grounds for-Dishonesty 7:3300; Disciplinary Penalties: Arbitral Review-Scope 7:4100; Disciplinary Penalties: Mitigating Factors, 7:4400.

CIRCUMSTANCES: The grievor was dismissed after it was discovered that he had called in sick in order to pursue another activity. The grievor seeks reinstatement without loss of seniority, benefits and salary. The conduct of the grievor is admitted. The employer argues that the Board does not have jurisdiction to substitute any other penalty under the terms of the Trade Union Act or a relevant 'Back to Work' agreement.

AWARD: The grievance succeeds. The grievor was discovered before he was paid sick pay for the day in question, and therefore the grievor did not complete the offence as described in the collective agreement. The grievor attempted to commit, rather than actually committed, the offence for which he was dismissed. As all of the elements of the offence are not established, the Board retains jurisdiction to substitute another penalty. The jurisdiction of the Board to substitute penalties can be displaced where, as is the case here, a collective agreement provides specific penalties for specific offences. However, all of the elements of the offence must be proved in order to displace the jurisdiction of the Board.

The Board orders the substitution of the discharge penalty with suspension of the grievor without pay and benefits, but without loss of seniority, to the date of reinstatement which shall be no later than seven days after receipt of this award.

AUTHORITIES: Re Sasso Ltd. v. Teamsters Union, 9 L.A.C. (2d) 152; General Drivers, Warehousemen et al v. Brinks Canada Limited 83 C.L.L.C. Para. 14,025 (S.C.C).

DECISION: 85-39

Public Service Commission of Halifax AND Canadian Union of Public Employees, Local 227

Judge J. A. MacLellan, Chairman; Donald H. McDougall, James Henley

Raymond Hill, for the union
Paul Murphy, for the employer
April 22, 1985

ISSUE: Skill and Ability: Arbitral Review-Senior Employee with Required Ability 6:3210; Job Posting: Criteria 6:3300.

CIRCUMSTANCES: A position for which the grievor had applied was awarded to another employee with less seniority. The grievor argues that he was qualified for that job and claims compensation. (The position is in fact less well paid than the grievor's present position, but it is not shift work, an important reason the grievor applied for it). The employer admitted during the hearing that the job description was poorly worded, and that the actual qualifications and experience sought were not evident from the description.

AWARD: The grievance is dismissed. The grievor did not have the actual qualifications to do the job at the time of the posting. The inaccurate wording of the job description was not due to any deliberate attempt to mislead and the employer acted fairly.

DISSENT (HENLEY): The grievor had the qualifications as set out in the job posting and these are the only qualifications which should be considered. The grievor should be appointed for the trial period provided for in the collective agreement, during which time he could completely familiarize himself with all of the duties of the position.

AUTHORITIES: Northern Electric Company and United Auto Workers, Local 27 (1972), 1 L.A.C. (2d) 53, (Palmer).

DECISION: 85-40

Metropolitan Transit AND Amalgamated Transit Union, Local 508

Judge J. A. MacLellan, Arbitrator

John MacPherson, for the union
Terry Roane, for the employer
April 23, 1985

ISSUE: Interpretation: Intention of the Parties 4:2100; Bereavement Leave 8:3510.

CIRCUMSTANCES: This is a policy grievance arising from the interpretation of the provision in a collective agreement relating to pay while on bereavement leave. The spare board operators were being compensated for one shift of six hours and forty minutes only. These operators rotate on a regular basis according to seniority, and each day's postings are readily ascertainable. The union argues that these operators should be compensated for shifts they would have worked if they had not been on bereavement leave. Such time lost can be determined by use of the daily postings. The employer argues that in accordance with past practice it need only compensate for six hours and forty minutes.

AWARD: The grievance is upheld. The collective agreement is unambiguous so that there is no need to resort to past practice or earlier collective agreements as aids to interpretation. The employer is to make any necessary adjustments for time lost on bereavement leave by spare board operators, based on the daily posting and not the six hour forty minute basis, from October 23, 1984.

DECISION: 85-41

Nova Scotia Forest Industries AND Canadian Paperworkers Union, Local 972

Judge J. A. MacLellan, Arbitrator

April 23, 1985

ISSUE: Discipline and Discharge: Grounds for - Theft 7:3310, 7:3312, 7:3314; Disciplinary Penalties: Arbitral Review - Substitution of Penalty 7:4100.

CIRCUMSTANCES: The grievor was suspended and later discharged after his conviction on a charge of theft over $200.00 in connection with an oxygen cylinder owned by the employer. The grievor had on previous occasions been given permission to borrow oxygen cylinders, but in this instance he had not been able to locate his supervisor and ask permission. The grievor took the cylinder but forgot to inform his supervisor of this. Although he intended to return the cylinder, it "slipped his mind". It was discovered on his property during a R.C.M.P. search for other property taken from the employer, which the grievor did not have. The grievor pleaded guilty to the criminal charge, and received a suspended sentence and two years' probation.

AWARD: The grievance is allowed. Consideration was taken of the grievor's previously unblemished work record, general integrity, family situation and finances, remorse and the circumstances surrounding the theft. The arbitrator concluded that the trust relationship between the employer and the grievor had not been so fractured that the grievor could not be given another chance. The penalty of discharge is altered to suspension to April 1, 1985, with compensation payable from April 1, 1985.

DECISION: 85-42

The Nova Scotia Civil Service Commission AND The Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink, for the union
Reinhold Endres, for the employer
April 19, 1985

ISSUE: Interpretation: The Intention of the Parties 4:2100; Job Classifications and Descriptions: Creation or Revision - Change of Work Load/Job Function 5:2410.

CIRCUMSTANCES: The grievor claims acting pay for a period during which he substituted for his supervisor who was on vacation. It is agreed that the grievor performed his supervisor's work. The employer resists the claim on the grounds that it is part of the grievor's job to substitute for the supervisor on such occasions, that the supervisor is a part-time employee, that the supervisor is not in the same bargaining unit as the grievor, and that the grievor did not accumulate the hours and days needed to fulfill the requirement for entitlement to acting pay within any one Monday to Friday work week.

AWARD: The grievance is dismissed. The grievor's job specification obliges him to act for the supervisor when the latter is on vacation, sick leave or absent. It is part of the grievor's 'regular' job, and therefore he is not entitled to acting pay. Furthermore, it is not the intent of the collective agreement to allow cross-bargaining unit rights. The employee who is being substituted for and the 'acting' employee must be in

the same unit. The employee who is being substituted for may be a full-time or a part-time employee. The hours and days required to be accumulated for entitlement to acting pay should be five consecutively scheduled working days (whether or not broken up by regularly scheduled days off) during which five days thirty-five hours are accumulated.

AUTHORITIES: Nova Scotia Government Employees Union (King & Morgan) and Her Majesty in Right of the Province of Nova Soctia Represented by the Civil Service Commission, unreported, March 1, 1984 (Outhouse); Nova Scotia Government Employees Union (Ellen Morrison) and Civil Service Commission, unreported, March 29, 1985 (Darby); Re Fairview Nursing Home Inc. and London and District Service Workers Union, Local 220 (1983), 9 L.A.C. (3d) 342; The Compact Edition of the Oxford English Dictionary, Oxford University Press, 1970, vol. 1, p. 538; The American Heritage Dictionary of the English Language, American Heritage Publ. Co., 1969, p. 288.

DECISION: 85-43

Allen's Dairy AND Retail, Wholesale and Department Store Union, Local 1015

Bruce Outhouse, Arbitrator

Kenneth Hennick, for the union
James Leefe, for the employer
April 26, 1985

ISSUE: Management Rights 5:0000.

CIRCUMSTANCES: The grievance is a test case arising out of the transfer from one plant owned by the employer to another plant, acquired in a merger, of the responsibility for processing milk for a particular market. The union was not consulted about this decision; the effect on the workers has been a lessening of the amount of overtime available. There have been no layoffs nor has there been a reduction of regularly scheduled hours. Workers in both plants are represented by different locals of the union. The union argues that the employer has breached the collective agreement by taking work from its members. The employer argues that regulation of production is within management's right to maintain and increase overall efficiency.

AWARD: The grievance fails. In order to restrict management's authority to operate its business in the manner which it, acting in good faith, deems to be most efficient, clear contractual provisions limiting such authority are required. There are no such effective provisions in the present collective agreement, especially where there are no layoffs or reductions in hours. Additionally, nothing in the collective agreement confers on the employees the right to serve any particular market area or to insist on the level of production that existed at the time the collective agreement was signed.

AUTHORITIES; Re United Steelworkers, Local 2551 and Algoma Steel Corporation (1957), 8 L.A.C. 273 (Laskin); Re United Steelworkers of America and Russelsteel Limited (1966), 17 L.A.C. 253 (Arthurs); Re Sealy (Western) Limited and Canadian Bedding and Furniture Limited and Teamsters Union, Local 351 (1982), 5 L.A.C. (3d) 360 (Hope).

DECISION: 85-44

Hawker Siddeley Canada Inc. (Trenton Works Division) AND United Steelworkers of America, Local 1231

Judge J. A. MacLellan, Aribtrator

Ed Levert, for the union
John Howatson, for the employer
May 22, 1985

ISSUE: Discipline and Discharge: Grounds for - Absence from Work 7:3100; Illness or Disability: Employer Response - Discipline - Absenteeism 7:3200.

CIRCUMSTANCES: The grievor, pursuant to an arbitration award in an earlier grievance, had been reinstated in his position. The award, dated December 8, 1981, contained a proviso that the grievor maintain, for a period of one year from the date of his return to work, attendance equivalent to the normal and reasonable standards of the employer in the department where the grievor worked. The grievor was recalled to work August 19, 1982, and, of the 33 days available for him to work in the subsequent year, he worked 26 days. The employer elected at that time not to terminate the grievor, but to allow him to continue until he had beem offered work for the number of days equivalent to a working year. At the end of this period, the grievor had been absent 25% of the time, five times greater than the normal absentee rate. The employer dismissed the grievor at that time. The grievor seeks a determination as to whether he has been properly dismissed.

AWARD: The grievance is dismissed. After examining the grievor's overall work attendance record, it is concluded that the grievor has failed to meet the normal and reasonable standards in the department in which he works, and accordingly the employer is justified in terminating the grievor's employment.

DECISION: 85-45

Hermes Electronics Limited AND International Brotherhood of Electrical Workers, Local 1651

R. J. Downie, Chairman; Richard Brazier; Donald H. McDougall

Ronald A. Pink, for the union
Hector McInnes, for the employee
April 18, 1985

ISSUE: Seniority: Applications - Lay-off 6:2000, 6:2200; Illness or Disability: Employer Response - Alternatives to Termination - Lay-off 6:2200; Illness or Disability: Effect on Employee - Ability to do Job 6:3360, 7:3220.

CIRCUMSTANCES: It is agreed that the grievor, a 'Light Assembler' was laid off out of seniority order, and that other 'Light Assemblers' with less seniority were kept on. The employer maintains that the grievor was laid off due to her inability, owing to health reasons, to perform all of the duties of a 'Light Assembler'. The employer attempted for a time to find eight hours a day of suitable work for the grievor within the plant, but when this proved impracticable, the grievor was laid off. The grievor seeks now to be "recalled with full pay and allowances to date of layoff".

AWARD: The grievance is dismissed. The employer is under no obligation at law or under the collective agreement to create a job for the grievor, nor is the employer obliged to transfer her to another job classification. If the grievor is able to perform the duties of a 'Light Assembler' at the time her seniority number comes up for recall, she would be entitled to be recalled. If the grievor cannot perform the duties of a 'Light Assembler', it is at the employer's discretion as to when, and in what capacity, the grievor is recalled.

DECISION: 85-46

City of Sydney Works Department AND Canadian Union of Public Employees, Local 759.

T. J. K. Gillis, Chairman; Kevin MacNeil; J. Vernon MacDonald

James Crosby, for the union
M. G. Whalley, for the employer
April 2, 1985

ISSUE: Discipline and Discharge: Grounds for - Theft 7:3310, 7:3312, 7:3314; Disciplinary Penalties: Mitigating Factors - Rehabilitative Potential 7:4422.

CIRCUMSTANCES: The grievor was employed as a watchman. He was convicted of the theft of property belonging to the employer and fined $100.00. The employer dismissed the grievor, citing this conviction. The grievor claims this penalty is too severe, as the items taken were of little value, and as he was intoxicated at the time of the theft.

AWARD: The grievance is dismissed. The offence committed by the grievor merits dismissal, particularly in view of his position of trust as a watchman. Further, the theft involved a degree of premeditation. The possibility of the grievor's rehabilitation with regard to his long-term problems with alcohol is insufficient to warrant substitution of a lesser penalty; in any event, the theft, and not alcoholism, was the reason for the dismissal.

DISSENT: Mr. MacNeil dissents; no reasons are given.

AUTHORITIES: Carling O'Keefe v. Local 325 of United Brewery Workers; Canadian Labour Arbitration, p. 387.

DECISION: 85-47

Metropolitan Transit Commission AND Amalgamated Transit Union, Local 508

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Terry Roane, for the employer
May 31, 1985

ISSUE: Job Posting: Fair and Reasonable 5:2520; Fairness: Job Posting 6:2310, 5:2300; Job Posting: Criteria 6:3300.

CIRCUMSTANCES: The grievor had repeatedly applied for other, higher-rated, positions within the bargaining unit. This grievance arises out of an application made for a position in September 1984. The grievor had been interviewed for a similar position in May 1984; he was given a cursory interview after the September position had in fact been awarded to a non-bargaining unit member. The union claims the employer has breached the collective agreement by failing to give the grievor a proper and timely interview, and by failing to comply with the provision of the collective agreement obligating the employer to hire suitable members of the bargaining unit for positions within the bargaining unit. The union seeks to have the position reposted, or, alternatively, awarded to the grievor. The employer claims the grievor is not suitable, that the selection process was properly carried out, and that the arbitrator is not to 'second-guess' its assessment of applicants.

AWARD: The grievance is allowed on two grounds. Firstly, the grievor is entitled, by the terms of the collective agreement, to a proper interview. He was 'suitable' in that he possessed the minimum qualifications. Secondly, those involved in the selection process seriously misapprehended the nature of that process as limited by the terms of the collective agreement. They sought 'the best man for the job', whereas the collective agreement obligates the employer to first satisfy itself that no member of the bargaining unit is suitable for the position. Non-bargaining unit applicants should not be considered until it is determined no suitable candidate exists within the unit. To consider outsiders and unit members together is to invalidate the selection process.

The appointment of the successful outside candidate is to be set aside, and a fresh competition, limited to those who applied in September 1984, is to be held. The successful candidate is to be considered a non-bargaining unit member for the purposes of this competition.

AUTHORITIES: Re St. Catherine's General Hospital and Service Employees Union, Local 204 (1975), 10 L.A.C. (2d) 258 (Adams); Re Corporation of the City of Toronto and Canadian Union of Public Employees, Local 43 (1978), 17 L.A.C. (2d) 3 (Kates); Re Atlantic Communication and Technical Workers' Union and Maritime Telegraph and Telephone Company, Limited (April 1, 1985), unreported (Darby); Re Falconbridge Nickel Mines Ltd. and United Steelworkers of America (1972), 30 D.L.R. (3d) 412 (Ont. C.A.); Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79 (1976), 13 L.A.C. (2d) 298 (Swan); Re Domtar Inc. (Domtar Chemicals Group, C.D.C. Division) and Canadian Chemical Workers Union, Local 17 (1980), 28 L.A.C. (2d) 107 (Brown).

DECISION: 85-48

Construction Management Labour Bureau AND International Brotherhood of Electrical Workers, Local 1852

Bruce Outhouse, Arbitrator

Mike Holland, for the union
Hugh Simpson, for the bureau
June 5, 1985

ISSUE: Council of Trade Unions: Award Binding on 3:1200; Employers Association: Bound by Award 3:1200; Negotiating History 3:4420.

CIRCUMSTANCES: This decision arises out of the submission to binding arbitration of outstanding issues under negotiation, and not out of a grievance proceeding. During 1984, the Bureau engaged in negotiations with the Cape Breton Island Building and Construction Trades Council (the Council), which represented the union and eleven other major unions. Two agreements, a Commercial Agreement and an Industrial Agreement, were reached. The union refused to ratify either of these agreements and continued negotiating with the bureau. With respect to the Commercial Agreement the union sought clarification on a proposed 'small jobs' clause, and also sought to limit the application of that clause to projects where the electrical component of the work did not exceed 20% of the total tender value. On January 17, 1985 the negotiating sub-committee of the Bureau agreed to both of these requests. The Bureau did not accept its sub-committee's recommendation, and insisted that the two agreements be linked as a package and not split.

With regard to the Industrial Agreement, the union seeks to retain the same travel and subsistence allowance provision as existed in the earlier collective agreement, now expired. The Bureau had successfully negotiated a new provision which gives reduced benefits; this provision had been accepted by all other unions represented by the Council. The Bureau argues that if it exempts the union from the new position, it will have to extend the greater benefits to all unions, thus losing its hard won provision.

A further issue was the operative date for retroactive increases in the general wage rate for each of the Commercial and the Industrial Agreement. With respect to the other eleven unions, the operative date was the respective date of ratification for each agreement.

AWARD: The clarification sought for the union on the 'small jobs' provision of the Commercial Agreement is granted. The wording of that clarification is set out. However, the 20% limit is not awarded. It is not seen as necessary, there being other mechanisms in the provision to protect the union. The wording of the provision is altered to eliminate loopholes raised by the union.

With respect to the travel and subsistence allowance provision of the Industrial Agreement, the Bureau prevails. The proposed reduction in benefits is not unreasonable in view of the economic climate, and it was achieved through the negotiating process. The present provision is in fact based on a compromise position put forward by the Council. The 'me too' principle would nullify the results of the negotiating process if the union were exempted from a provision to which the other unions had agreed.

Finally, the operative date for retroactive increases with respect to the Commercial Agreement is January 17, 1985, at which time the union and the Bureau's negotiating sub-committee were in agreement. The operative date for retroactive increases under the Industrial Agreement is the date of this award, June 5, 1985.

DECISION: 85-49

St. Vincent's Guest Home AND Canadian Union of Public Employees, Local 1082

Judge J. A. MacLellan, Chairman; Jack Ingram; James Henley

Raymond Hill, for the union
Don McDougall, Nancy I. Murray, for the employer
May 14, 1985

ISSUE: Vacation: Scheduling Vacations: 8:3240..

CIRCUMSTANCES: Under the collective agreement, vacations begin on a Monday, while the work week and work schedules begin on Sunday. The grievors had to use a 'banked' statutory holiday to get the Sunday of the week following their vacations off, enabling them to return to work on Monday instead of Sunday. Past practice had been to permit employees to have the Sunday off in exchange for working on Tuesday, a regularly scheduled day off. The grievors in this case were off Sunday, worked Monday and were off Tuesday. The employer changed its practice following a reduction of the number of employees in the grievors' department. The union requests a return to past practice, alleging the employer is in breach of the collective agreement.

AWARD: The grievance is dismissed. The collective agreement does not provide for Sunday to be a day off upon returning from vacation. The employer had the discretion to make such an arrangement, but the provision in the collective agreement whereby the employer is not obligated to incur additional costs in making such arrangements allows the employer to require an employee to return to work on Sunday and to take the normally scheduled day off.

DECISION: 85-50

Construction Association Management Labour Bureau Limited AND Labourers' International Union of North America, Local 615

Thomas A. Cromwell, Arbitrator

Raymond Larkin, for the union
Greig MacLeod, for the employer
May 7, 1985

ISSUE: Collective Agreement: Binding Effect - Determination 4:0000.

CIRCUMSTANCES: A contractor awarded a project at CFB Halifax was bound by two collective agreements; the issue involved is which of these agreements applies to the particular project. The basis of application of the agreements is the nature of the work or project. However, the pay rates in the 'Highway and Heavy Construction Agreement' are only 80% of the pay rates in the 'Industrial and Commercial Agreement'. The union seeks a declaration that the latter agreement is the applicable one.

AWARD: The declaration is awarded in favour of the union. The 'Highway and Heavy Construction Agreement' applies only to specific types of projects. The project involved here is not included; the project involved here is neither a pier or a wharf, which are included. Furthermore, even if the particular project in question here could be considered a pier or wharf, it would be a pier or wharf which was part of a contract for "industrial, commercial and institutional buildings", which are specifically excluded from the 'Highway and Heavy Construction Agreement'. Therefore, the 'Industrial and Commercial Agreement' applies to this project, and payment shall be at the rates it prescribes.

DECISION: 85-51

The Board of Management of Sutherland-Harris Memorial Hospital AND The Nova Scotia Nurses Union

R. Lorne MacDougall, Chairman; Raymond F. Larkin; Donald H. McDougall

Terry L. Roane, for the union
Brian Johnston, for the employer
May 17, 1985

ISSUE: Job Posting: Fair and Reasonable 5:2520; Fairness: Job Posting 6:2310, 5:2300; Fairness: Vacancy - Filling 6:3000; Skill and Ability: Arbitral Review 6:3100; Job Posting: Criteria 6:3300; Skill and Ability: Arbitral Review - Senior Employee if Relatively Equal 6:3220.

CIRCUMSTANCES: A nursing position in the outpatient department was awarded to a nurse with prior experience in that department, but with least seniority of all applicants. The collective agreement provides that "if fitness, ability and qualifications are equal, seniority shall prevail." The union claims that this provision of the collective agreement has been violated, and asks to have the issue of selection remitted back to the employer.

AWARD: The grievance succeeds. The evidence discloses a subjective bias in favour of two applicants, including the successful applicant. Further, two of the applicants should have been given an opportunity to answer to criticisms or complaints about them prior to the selection having been made. This is particularly true as these candidates were eliminated because of these criticisms or complaints of which neither of them had knowledge. The selection process was unfair, and is therefore invalidated. It is remitted back to the hospital. Where there are hospital concerns about an applicant, that applicant should be given the opportunity to respond to those concerns before the final selection is made. Nor should any applicant be dismissed from consideration because another applicant has had the opportunity to work in the outpatient department. Only after the 'fitness, ability and qualifications' of the applicants are fairly assessed does seniority have possible application.

AUTHORITIES: Re United Automobile Workers and Westeel Products Ltd. (1960), 11 L.A.C. 199; Re Brant County Board of Education and Canadian Union of Public Employers, Local 282 (1975), 8 L.A.C. (2d) 153; Re Textile Workers Union and Lady Galt Towels ltd. (1969), 20 L.A.C. 382; Re Northern Telecom Ltd. and United Automobile Workers, Local 1829 (1980), 25 L.A.C. (2d) 379.

DECISION: 85-52

Cape Breton Offshore Fabricators AND United Mine Workers of America, Local 7749

Charles O'Connell, Arbitrator

Rod Lee, for the union
Bernard Boudreau, for the employer
June 12, 1985

ISSUE: Interpretation: Intention of the Parties 4:2100; Lay-off: Seniority - Applied 6:2000, 6:2200; Recall: Seniority 6:2000; Seniority: Applications - Bumping 6:2330.

CIRCUMSTANCES: A collective agreement provides for two types of seniority: classification seniority and plant-wide seniority. Classification seniority is used to determine the order of employees to be laid off within any pariticular classification. Plant-wide seniority can be used by a employee who has been laid off, or otherwise displaced, to in turn displace junior employees in other classifications. Some classifications are restricted to those with prior experience, but that is not at issue in this case. The union argues that plant-wide seniority should govern bumping. The grievor claims to be entitled to bump an employee in another classification who has less plant-wide seniority but more seniority within his classification than does the grievor in that classification.

AWARD: The grievance is dismissed. An employee with classification seniority cannot be bumped by another employee who has plant-wide seniority. The provisions of the collective agreement are intended to provide that the most experienced workers in a job classification be left on the payroll as long as possible in the event of a lay-off.

DECISION: 85-53

Carey Bros. Masonry Limited AND International Union of Bricklayers and Allied Craftsmen, Local 1 AND Construction Association Management Labour Bureau Limited

Bruce Outhouse, Arbitrator

N. Blaise MacDonald, for the union
Brian Johnston, for the bureau
Ronald Pink, for the company
June 12, 1985

ISSUE: Insurance and Welfare Plans: Incorporation into Collective Agreement 2:1200; Insurance and Welfare Plans: Assessment of Damages 2:1416; Insurance and Welfare Plans: Payment of Premiums 8:3310; Employer's Association: Participation in Hearing 3:1200; Parties and Participants 3:1200; Interpretation: Intention of the Parties 4:2100.

CIRCUMSTANCES: This hearing was a consolidation of two grievances which raised common questions of fact. One of the grievances was between the union and the Bureau, the other between the union and the employer. The employer sought to have the Bureau excluded from participation in the hearing of the union-employer grievance; the union then requested the employer be excluded from participation in the union-Bureau grievance. Both requests were denied. As the Bureau is the collective bargaining agent for all unionized employers and as it is a party to the collective agreement the employer is alleged to have breached, the Bureau is entitled to participate in the hearing of the union's grievance. As the employer is not a member of the Bureau, natural justice requires that in a proceeding which will directly affect it, the employer has a right to be heard. In the event, the union-Bureau grievance is still pending, and the award in this decision is only pertinent to the union-employer grievance.

Prior to 1984, the Bureau had negotiated with the Atlantic Provinces Trowel Trades Conference (the Conference) which acted on behalf of the employees of the employer. In 1984, for the first time, the union negotiated for these employees. A collective agreement was signed by the union and the Bureau on October 19, 1984. This agreement bound the employer. It provided for premiums to be paid to a health and welfare fund established by the union. The employer continued to remit the premiums it had been paying under the terms of prior collective agreements to a health and welfare fund administered by the Conference. On December 11, 1984 the union requested the employer to pay all outstanding remittances retroactive to July 23, 1984. The employer did not do so, and the union bought this grievance.

The union alleges the employer has breached the collective agreement and seeks as damages the full contributions from October 19, 1984 or, alternatively, from December 11, 1984. It argues no mitigation is possible as the employer acted without "clean hands". The employer argues it is not bound by the relevant clause as it is not a signatory to the agreement, and that if it is bound, only declaratory relief should be awarded. The Bureau supports the union's claim that the employer is bound to make the remittances to the union's health and welfare fund.

AWARD: The grievance succeeds. The intention of the parties was clearly to establish a new health and welfare fund, and to bind the employer, whether or not the employer is a member of the Bureau. The employer is ordered to comply with the provisions of the collective agreement and to pay to the union the amount needed to accomplish an immediate transfer of benefit coverage to the union's plan. The relevant date for calculating coverage shall be October 19, 1984. Jurisdiction is retained to deal with any problems which might arise in connection with the implementation of the award.

DECISION: 85-54

Digby Town and Municipal Housing Corporation (Tideview Terrace) AND Service Employees' International Union, Local 902

Judge J. A. MacLellan, Chairman; Donald McDougall; Rene Quigley
June 14, 1985

ISSUE: Discipline and Discharge: Grounds for-Assault 7:3430; Disciplinary Penalties: Arbitral Review-Substitution of Penalty 7:4000; Disciplinary Penalties: Mitigating Factors-Rehabilitative Potential 7:4422.

CIRCUMSTANCES: The grievor was suspended on January 21, 1985 and dismissed on February 1, 1985 after she struck a patient resident in the employer's nursing home. The grievor admits this incident, but claims discharge is too severe a penalty. The grievor seeks reinstatement retroactive to February 4, 1985 with pay and benefits.

AWARD: The grievance succeeds in part. Having regard to the circumstances and the way the incident occurred and the previous good record of the grievor, the discharge is excessive and a penalty of suspension is substituted. The grievor is to be reinstated as a probationary employee within one week of the date of this award, and is to be on probation for a maximum of six months. The employer may choose to return the grievor to the status of a full employee at any time during this trial period. On the other hand, should the employer, acting bona fide, be satisfied that the grievor, because of some inappropriate action towards a resident, is not fit to work at the nursing home, she may be terminated. In that event, the grievor may use the grievance-arbitration procedure to challenge the existence of just cause for discipline, but if the just cause is shown to be inappropriate conduct towards a resident, the grievor will not have the right to challenge the penalty as excessive. No monetary compensation is awarded the grievor.

AUTHORITIES: Re Baptist Housing Society (Grandview Towers) v. Hospital Employees Union (1982), 6 L.A.C. (3d) 430.

DECISION: 85-55

Cape Breton District School Board AND Nova Scotia Teachers' Union

Frank L. Elman, Arbitrator

Charles Broderick, for the union
Ron Downie, for the employer
June 17, 1985

ISSUE: Interpretation: Intention of the Parties 4:2100.

CIRCUMSTANCES: This is a rehearing ordered as the result of an appeal of a prior decision of this arbitrator to the Supreme Court. The sole issue is the meaning of the words "years of service" in the clause providing for payment of a service award to be calculated by multiplying a sum by the "years of service" of the employee. The union argues that all of the grievor's years of service are to be counted in this calculation, both before and after the interruption of her employment. The employer argues that only the years of service from the date of the grievor's rehiring should be counted in the calculation.

AWARD: The grievance fails. The collective agreement does not have the clear language required to provide any employee with benefits to be used in a future relationship with the employer. Once a period of employment has been terminated by resignation, dismissal or quit, it is not extended by a subsequent rehiring at some future date.

AUTHORITIES: Reid and Davis, Administrative Law and Practice (2nd) 1978 at 113; Re International Woodworkers of America, Local 1-217 and Industrial Mill Installations Limited, 52 D.L.R. (3rd) 318; Cozens vs.

Brutus (1973) A.C. 854; Re Hotels, Clubs, etc., Employees Union Local 261 and Beacon Realty Company Limited (1968), 19 L.A.C. 227; Re United Steelworkers of America and Westeel-Rosco Ltd. (1968), 19 L.A.C. 378; Re Lanark Manufacturing Co. and United Automobile Workers, Local 1383 (1973), 3 L.A.C. 98.

* Prior Court decision ordering re-hearing is summarized at 85-55A

DECISION: 85-55A

Cape Breton District School Board AND Nova Scotia Teachers Union

K. Peter Richard, S.C.J.

Frederick P. Crooks, for the union
Charles Broderick, for the employer
February 5, 1985

ISSUES: Judicial Review - Jurisdictional Error 1:5830; The Collective Agreement - The Object of Construction: Intention of the Parties 4:2100; Prior Agreements 4:2240; Seniority - Acquisition and Termination - Nonworking Periods 6:1110.

CIRCUMSTANCES: A teacher, employed from 1945 to 1983 with a year's absence in 1959, grieved the school board's long-service award for 13 years rather than 26 years. The arbitrator upheld the board, on the grounds that "years of service" according to the collective agreement meant consecutive years of service. The union appealed to the court to set aside his decision as having "altered, amended or modified" the language of the contract.

AWARD: The grievor succeeded, with costs. The learned judge, comparing the language of the collective agreement on the long-service award (article 13) with that on seniority (artice 17) and with a predecessor board's contract which required a minimum of 10 years' consecutive service to qualify for the award, concluded that the silence of article 13 was significant of intent. The absence of the "consecutive" requirement when such wording was open to the parties meant it was not required. The court found therefore that the arbitrator did in fact "modify or amend" thus exceeding his jurisdiction, and remitted the issue to him for another determination under law.

AUTHORITIES: N. S. Arbitration Act, R.S.N.S. (1967) c.12; International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), Local 720 v. Volvo Canada Ltd. (1979) 33 N.S.R. (2d); McConnell et al. v. Douglas 109 Aircraft Company of Canada Ltd. et. al. (1979) 29 N.R. 109.

DECISION: 85-56

Minas Basin Pulp and Power Company Limited AND Canadian Paperworkers Union, Local 583

Bruce Outhouse, Chairman; Gerald Yetman; Eric Durnford

Ronald Pink, for the union
Donald McDougall, for the employer
May 23, 1985

ISSUE: Discipline and Discharge: Grounds for-Carelessness 7:3520; Discipline and Discharge: Grounds for-Refusal to Obey Instructions 7:3610, 7:3612; Disciplinary Penalties: Reasonableness 7:4300.

CIRCUMSTANCES: During a shift worked by the grievor on September 21, 1984, a boiler in the employer's plant ran dangerously low on water. The boiler was shut down and out of operation for a few days, but proved to have sustained no damage. On October 6, 1984 a meeting of management personnel was held to discuss the incident with the grievor. The grievor would not attend the meeting. He was suspended for fifteen working days plus one-half hour and ordered off the employer's premises. The union on behalf of the grievor claims this penalty is too severe. The employer argues the grievor was careless, that he was insubordinate by refusing to attend the October 6 meeting, and that the penalty is not excessive.

AWARD: The grievance succeeds; the penalty is reduced to a five-day suspension. The grievor is to receive compensation for the additional ten days plus one-half hour for which he was suspended. The grievor did not exercise due care in the circumstances, but did not wilfully or recklessly disregard the duty of care towards the employer's property or the safety of his fellow workers. The evidence on the issue of the alleged refusal to obey an order to attend the October 6 meeting is not found on the balance of probabilities to substantiate the charge of insubordination. Finally, having regard to the circumstances and the fact no damage was caused, and having regard to similar cases, the fifteen-day suspension is seen as excessive.

DISSENT (Durnford): The grievor was negligent in the performance of his duties. His conduct merits the discipline he received. Further, the issue of insubordination reveals the grievor's continued attitude of avoiding responsibility for his actions. Substitution of a lesser penalty in this case is an unwarranted intrusion in plant discipline. The penalty imposed falls within the range of reasonable penalties and as such should stand.

AUTHORITIES: Re Corporation of the Town of Dundas and Canadian Union of Public Employees, Local 1006 (1972), 1 L.A.C. (2d) 161 (Reville); Re International Union of United Brewery, Flour, Cereal, Softdrink and Distillery Workers, Local 173 and Carling Brewers Limited (1971), 22 L.A.C. 406 (Palmer); Re United Steelworkers, Local 4153 and Barber Die Casting Co. Ltd. (1962), 13 L.A.C. 168 (Arrell); Douglas Aircraft (1972), 2 L.A.C. 56 at 78 (Weiler).

DECISION: 85-57

The Board of Governors of St. Frances Xavier University AND Canadian Brotherhood of Railway, Transport and General Workers Union, Local 605

Judge J. A. MacLellan, Arbitrator

Raymond Larkin, for the union
Bruce MacIntosh, for the employer
June 20, 1985

ISSUE: Resignation: 7:7100.

CIRCUMSTANCES: In January 1985 the grievor wrote a letter to the employer in which he complained of working and safety conditions. In the letter, the grievor stated "I would prefer to look for employment elsewhere than continue to work under those conditions". On February 14, 1985 the employer sent the grievor a letter accepting his resignation. The grievor promptly began this proceeding, claiming he has not resigned, nor does he have any intention of so doing. The grievor seeks reinstatement without loss of wages or benefits. The employer claims that the grievor has resigned, or alternatively, that his letter is evidence of his unsuitability for the position, and that he has a poor attitude, and that the employer may dismiss him.

AWARD: The grievance succeeds. The grievor's letter was overstated and exaggerated, but evidences no express intention of resignation. The employer overreacted by dismissing him. Further, the letter does not indicate, nor does any evidence reveal that the grievor is an unsuitable employee, or that he has been insubordinate. The grievor is to be reinstated immediately with all wages and benefits restored from the date of termination.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at 513.

DECISION: 85-58

Sydney City Hospital AND Canadian Union of Public Employees, Local 1613

Charles O'Connell, Arbitrator

Charles Cormier, for the union
Phillip Veinotte, for the employer
June 28, 1985

ISSUES: Seniority: Applications - Promotion, Demotion and Transfer 6:2000, 6:2100; Promotion, Demotion and Transfer - Promotion Defined 6:2100.

CIRCUMSTANCES: The grievor, a laboratory technologist, applied for an internal competition which was taken by a less senior applicant. The position was of the same classification and salary as the grievor's position but had more favourable hours and would be less stressful. The grievor seeks to be placed in the said position. Due to the better hours and her preference for the job the grievor argued it was a promotion thereby requiring a recognition of seniority rights. The employer argued that it was a transfer and according to the collective agreement this meant that management rights were unfettered by seniority considerations.

AWARD: The grievance fails. The only criteria defining a promotion in the collective agreement were a change in job classification and an increase in salary, not present in this case.

DECISION: 85-59

Sivaco Maritime **AND** The United Steel Workers of America, Local 8679

Elwin J. MacNeil, Arbitrator

John C. MacPherson, for the union
David J. Bright, for the employer
June 28, 1985

ISSUES: Fringe Benefits 8:3000; Bereavement Leave 8:3510; Duration 8:3530; Interpretation of Collective Agreement 4:2000; Interpretation of "Day" 4:2100; Jurisdiction of the Arbitrator 2:000; The Collective Agreement 2:1200; The Arbitration Process 3:1000; Admissability of Evidence 3:4000, Past Practice 3:4430.

CIRCUMSTANCES: Grieved is non-payment for two days bereavement leave. The grievor worked shifts on weekdays only. On Thursday evening of the week in question the grievor received notice that his mother had died. After consultation with his foreman the grievor left work to begin his bereavement period. He returned to work Wednesday and therefore had not worked his scheduled shifts on Thursday, Friday, Monday and Tuesday. The collective agreement provides that an employee is entitled to be paid "four days' wages". The employer argues that this includes Saturday and Sunday. The union argues that the day in this sense means work day.

AWARD: The grievance succeeds. Although there is some case law suggesting that in the absence of language to the contrary "day" means calendar day, this case can be decided from simply interpreting the collective agreement at hand which is the primary source of the arbitrator's jurisdiction. "Wages" in the collective agreement are defined as hourly wages. The grievor works eight hour work days. If an employee is entitled to four days' wages for bereavement leave this refers to work days as one normally only receives wages for hours worked.

The employer was not permitted to lead extrinsic evidence of past practice as it was held that the article of the collective agreement in question was not of "latent ambiguity".

AUTHORITIES: Re Board of Education for the City of Hamilton and Ontario Secondary School Teachers' Federation, District 8 (1983) 10 L.A.C. (3d) 126; Re International Chemical Workers, Local 345 and Canadian Ohio Brass Co. Ltd. (1970) 21 L.A.C. 429; Re Corporation of the City of London and Canadian Union of Public Employees, Local 107 (1974) 7 L.A.C. (3d) 46; International Fur and Leather Workers Union in Re Robson Leather Co. Ltd. (Oshawa) (1951) 3 L.A.C. 954; Re International Moulders, Local 28 and Hamilton Gear and Machine Co. (1983) 14 L.A.C. 76; Re International Nickel Co. of Canada Ltd. and United Steelworkers (1974) 5 L.A.C. (2d) 331; Re LaFarge Concrete Ltd. and Teamsters Union, Local 231 (1980) 27 L.A.C. (2d) 429; Re United Automobile Workers and Minnesota Mining & Manufacturing of Canada Ltd. (1972) 24 L.A.C. 242.

DECISION: 85-60

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink and Gordon Forsyth, for the union
Alison Scott, for the employer
June 27, 1985

ISSUES: Arbitrability 2:3100; Evidence: Types of Evidence - Extrinsic Evidence - Past Practice 3:4430; Extrinsic Evidence 3:4400; Estoppel 2:2210; Interpretation: Ambiguity 2:2220; Jobs and Classifications: Classifications 5:2000; Time Limits: Continuing Grievance 2:3128.

CIRCUMSTANCES: The two grievors, after one year's satisfactory performance in the first level of a particular job classification, received merit pay increases but were not reclassified. One year later, after satisfactory job reviews both were given further pay increases and one was reclassified one step higher in the job classification. The employees grieved the failure to reclassify them following each of their merit pay increases. The grievances were not submitted to the employer after the period of time prescribed by the collective agreement.

The employer raised preliminary objections on the grounds of untimeliness and lack of arbitrability. It held that nothing in the collective agreement gave the grievors a right to reclassification automatically upon receipt of a merit pay increase. In the absence of ambiguous language in the agreement evidence of past practice was not admissible. Further, promissory estoppel was not available to labour arbitrators in Nova Scotia. The union argued that, as the grievances were continuing grievances dating back to the first failures to reclassify, they were not subject to the time limit in the collective agreement. Alternatively, the

doctrine of promissory estoppel allowed the grievances to be heard on the merits. The union held that the job classification in question was a series classification where, in the past, reclassification one level upwards followed automatically upon a satisfactory performance rating for the past year.

AWARD: The grievance succeeds. The arbitrator found that the grievances were not timely, nor did they fit the definition of continuing grievances. However, promissory estoppel was available to him and therefore the grievances were arbitrable. The arbitrator found clear evidence of past practice of automatic reclassification upon grant of a merit pay increase. The union relied on this past practice in that it altered its bargaining position by not negotiating for such automatic reclassification during negotiations for the current collective agreement. The grievors suffered detriment through loss of the salary they would have earned if they had properly been reclassified. The employer was directed to reclassify the grievors in accord with their two past merit increases and pay back salary accordingly.

AUTHORITIES: Palmer, Collective Agreement Arbitration in Canada, (2nd ed.) at pp. 191-195; Brown and Beatty, Canadian Labour Arbitration (2nd ed.) at pp. 97-98, 82-84, 154-155, 439; Re Dominion Glass, arbitrator did not give the source; Province of British Columbia (1982), 5 L.A.C. (3d) 404 (Gaetz); R. A. Schonbek & Co, 18 L.A.C. 30 (Lande, 1966-Que.); Re Hydro-Electric Power Commission of Ontario and Office & Professional Employees International Union (1973), 2 L.A.C. (2d) (Weatherhill); Re Consolidated-Bathurst and Paperworkers Union (1984), 15 L.A.C. (3d) (Kuttner); Re Hawker Siddley Canada Inc. Trenton Works Division and United Steelworkers, Local 1237 (1983), 150 D.L.R. (3d) 509 (Nathanson, J.); U.S.W., Local 7621 and Islam et al and Smoky River Coal Limited (1984), 31 Alta. L.R. (2d) 269 (Alta. S.C.T.D.); Re C.W.R. Co. et al and Beatty et al. (1981), 128 D.L.R. (3d) 236 (Ont. Div. Ct); U.S.W., Local 7621 and Islam et al and Smoky River Coal Limited (no. 17832, May 8, 1985) (Alta. C.A., Stevenson, J.); Consolidated-Bathurst (August 1, 1984 - unreported) (Dickson, J.); Le Syndicat Catholique des Employes de Magasins de Quebec Inc. v. La Compagnie Paquet Ltee. (1959), 18 D.L.R. (2d) 346 (S.C.C.); Bell Canada and Office and Professional Employees' International Union, Local 131 (1974) S.C.R. 335 (Laskin, J.); Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Commission (1979) 25 S.C.R. 227; Volvo Canada Ltd. v. United Auto Workers of America, Local 720 (1980), 1 S.C.R. 178; Douglas Aircraft Co. of Canada Ltd. v. McConnell et al. (1980), 1 S.C.R. 245; Young v. Canadian Northern Railway (1931), 1 D.L.R. 645 (P.C.); Re Triangle Mechanical Ltd. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488 (1984), 15 L.A.C. (2d) 400 (Power); C.U.P.E., Local 1392 and Dalhousie University (1980), 39 N.S.R. (2d) 655 (N.S.S.C.T.D.); Bower & Turner, The Law Relating to Estoppel by Representation (3rd ed.) at pp.367-401; Combe v. Combe (1951), All E.R. 767 (C.A); Hughes v. Metropolitan Railway Co. (1877), 2 App. Cases 439; Leitch Gold Mines Ltd. et al v. Texas Gulf Sulpher Co. (Inc.) et al. (1969), 3 D.L.R. (36) 161; W. J. Alan & Co. Ltd. v. El Nasr Export and Import Co. (1972) 2 All E.R. 127 (C.A.); Judicature Act, S.N.S. 1972, c.2; Trade Union Act, S.N.S. 1972, c.19.

DECISION: 85-61

Nova Scotia Government Employees Union AND Halifax Infirmary

Peter E. Darby, Arbitrator

John G. MacPherson, for the union
Robert Cook, for the employer
July 8, 1985

ISSUES: Fringe Benefits 8:3000; Bereavement Leave 8:3500, Duration 8:3530; Interpretation of Collective Agreement 4:2000, Interpretation of "day" 4:2100; Jurisdiction of Arbitrator: Limits to the Arbitration of Grievances - Arbitrability 2:3000, Collective Agreement Limitation 2:3100, Time Limits 2:3128; Secondary Sources of Jurisdiction 2:2000, Estoppel 2:2200, The Doctrine 2:2210, Applications of Estoppel 2:2220.

CIRCUMSTANCES: Grieved is the loss of a regular benefit, a vacation day, by an employee whose bereavement leave overlapped with a previously scheduled vacation day. The collective agreement stated that an employee "... shall not suffer any loss of regular pay and benefits as a result of the leave of absence." The employer argued that there is no right of "substitution" where it is not expressly stated, as such a right is expressly stated in reference to sick leave but is not so stated for bereavement leave.

The employer also argues that the arbitrator has no jurisdiction to hear this grievance because the grievance was untimely - thus a preliminary objection. At step 3 of the grievance process notice of refusal, though mailed, was never received by the union. Some time later, more than the 15 day time limit in the collective agreement, the union contacted the employer re their perceived delay in the transmission of a reply. At this time a copy of the letter which had been lost in the mail was sent to the union. Previous to this the employer requested and received from the union an extension to a time limit for step 2 of the grievance process. Both parties exceeded time limits for the appointment of arbitrators.

AWARD: The grievance succeeds. The preliminary objection fails. The 15 day time limit was not missed if the period was interpreted to start from the date of actual receipt of the notice of refusal from the employer. Alternatively, the doctrine of promissory estoppel is applied and as neither party can claim strict compliance with the time limits, neither can use them to prevent the hearing of the merits of the case. As to the employer's argument that the time limits are mandatory (as opposed to directory): the arbitrator held that such as decision would require very clear language to the effect that a failure to meet the limit in question had a clearly defined result. Further, to construe it as mandatory it would have to be shown that it had prejudiced the employer and that the delay in the process was attributable to the union.

The grievance succeeds on the merits. Vacation leave is a regular benefit. To deprive the grievor of a day's vacation leave because it happened to fall among a series of days the grievor had off for the bereavement of a family member would result in the grievor suffering a new loss of one vacation day. The employer's expressio unius argument fails as the collective agreement is ambiguous as to substitution of leave.

AUTHORITIES: Trade Union Act, S.N.S. 1972, c.19, s.7; Re Air Canada (1979), 22 L.A.C. (2d) 298; Re Alcan Smelters and Chemicals Ltd. and Canadian Association of Smelters and Allied Workers, Local 1, (1982), 5 L.A.C. (3d) 83 (Hope); All Saints Hospital, Springhill, N. S. and N. S. Nurses' Union, (Mar 16, 1981), (Langille) (unreported); Canadian Airline Employees' Association and Haley v. Eastern Provincial Airways (1963) Limited (1981), 49 N.S.R. (2d) 28 (N.S.S.C.A.O.), aff'g (1981), 45 N.S.R. (2d) 637 (N.S.S.C.T.D.); Re CN/CP Telecommunications and Canadian Association of Communications and Allied Workers (1982), 3 L.A.C. (2d) 54; Re CN/CP Telecommunications and Canadian Telecommunications Union (1981), 4 L.A.C. 205 (Beatty); Re C.N.R. Co. Telecommunications Department and Canadian Telecommunications Union, Division 43 of United Telegraph Workers, (Jan. 12, 1979) (Brunner) (unreported); C.U.P.E., Local 1047, C.L.C. and Colchester East Hants Amalgamated School Board (1980), 40 N.S.R. (2d) 132 (N.S.S.C.A.D.); Re Consolidated Bathurst and Paperworkers Union (1984), 15 L.A.C. (3d) 423; Re Dominion Consolidated Truck Lines Ltd. and Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 141 (1976), 9 O.R. (2d) 195; Re Eastern Provincial Airways (1963) Ltd. and Canadian Airline Employees Association (Eagles) [1980], 20 L.A.C. (2d) 150 (Christie): General Truck Drivers Union, Local 938 et al v. Hoar Transport Co. Ltd. [1969] S.C.R. 534, 4 D.L.R. (3d) 449; Re Gray Forgins and Stampings Ltd. and International Union of Electrical Radio and Machine Workers (1980), 27 L.A.C. (2d) 61 (Shime); Hawker Siddeley Canada Inc., Trenton Works Division v. United Steelworkers of America, Local 1231 (1983), 59 N.S.R. (2d) 29; Re Municipality of Metropolitan Toronto and Toronto Civic Employees Union, Local 43 (1973), 3 L.A.C. (2d) 126(Schiff); Re Municipality of Metropolitan Toronto and Civic Employees Union, Local 43 et al. (Ont. C.A.), 8 O.R. (2d) 499, 58 D.L.R. (3d) 371; Ontario Nurses' Association (Martin) and Peterborough Civic Hospital (Jan. 26, 1984) (Kates) (unreported); Re Province of Ontario and Ontario Provincial Police Association, Inc. (1978) 16 L.A.C. (2d) 307 (Shime); Re Smith Transport Co. Ltd. and Teamsters Union, Local 938 (1979) 20 L.A.C. (2d) 35 (Branner); Re Soeurs De La Charites D'Ottawa and Syndicat Des Services Hospitaliers Du District D'Ottawa (1973), 3 L.A.C. (2d) 392, Brown and Beatty, Canadian Labour Arbitration, (1984, Can. Law Book Co.) 2nd ed.; G. Spencer Bower and A. K. Turner, The Law Relating to Estoppel by Representation (Butterworth's) 3rd ed. 1977; A. T. Denning, Recent Developments in the Doctrine of Consideration, 15 Mod. L. Rev. 1 (1952).

DECISION: 85-62

Dawson Memorial Hospital **AND** International Union of Operating Engineers, Local 968B

J. A. MacLellan, Chairman; Donald McDougall; Al Cunningham

John MacPherson, for the union
Eric Durnford, for the employer
July 11, 1985

ISSUE: Discipline and Discharge: Grounds for - Sleeping on Job 7:3570; Discipline: The Reasonableness of the Penalty - The Doctrine of the Culminating Incident 7:4310, Discharge: Grounds for - Alcoholic Beverages 7:3560, 7:3010; Discharge: Grounds for - Inability to Discharge Employment Obligations 7:3220; Disciplinary Penalties: Mitigating Factors - Rehabilitation Potential 7:4422.

CIRCUMSTANCES: The grievor was dismissed for falling asleep on the job as a hospital boiler operator, in conditions where a new light fuel oil had increased the risk of fire. An employee for eight years, in the last three he had received written and verbal warnings, with several of the latter in previous months. At the time of the written notice, grievor admitted he had taken drink but denied it affected his alterness. At the hearing, faced with testimony from fellow employees, the grievor was unable to deny falling asleep.

AWARD: Grievance is dismissed and discharge upheld. With no extenuating circumstances nor improvement in his attitude over time, with real risk to the safety of others in the hospital, the Board found his outright discharge justified.

DECISION: 85-63

Metropolitan Transit Commission of Halifax, Dartmouth and the Municipality of the County of Halifax **AND** Amalgamated Transit Union, Local 508

Prof. Peter Darby, Arbitrator

John C. MacPherson, for the union
Terry Roane, for the employer
July 25, 1985

ISSUES; Discipline and Discharge - Where the Argument is Silent 7:1200; Penalties for Work Related Misconduct - Warnings, Suspensions, Discharge 7:3542, 7:3540; Refusal to Follow Instructions 7:3610; Insolent and Unco-operative Behavior - Obscene Language 7:3660; Union Rights and Liabilities - Union Business on Company Time 9:1400.

CIRCUMSTANCES: At issue was the employer's letter condemning the employee's conduct. He had told his supervisor, in protest against shifts starting at 6:00 a.m. rather than 7:30 a.m., that he had "been co-operative in the past" but the company "could not expect that in future". The letter was sent to the union next day. Despite union protest it was placed on the employee's personnel file a month later, at which time he received a copy. He and the union grieved that this was disciplinary action, taken without a union representative present.

The employer's counsel asserted that the letter was not disciplinary, offering so to note on the employee's file; that if disciplinary, its action was within management rights since the agreement was silent, requiring "just cause" only for suspension or discharge.

AWARD: The grievance succeeds in part. The letter is not to be part of the disciplinary record, having no more weight than an oral warning. (1) The employer must give a specific unambiguous undertaking that the letter be labelled "not disciplinary", i.e. that future conduct of this nature will be considered a first offense. (2) The arbitrator found the letter's words "will not be tolerated" to be future tense, conditional rather than disciplinary, and therefore did not require the presence of a union representative at issuance. (3) Ambiguity of evidence, confusion or inadvertence in addressing the letter confirm (2). (4) If management had failed to allow union representation in issuing a disciplinary letter, it would have been grounds for the arbitrator to vitiate the discipline.

AUTHORITIES; Re Mount Sinai and Nurses Association, Mount Sinai Hospital (1976), 13 L.A.C. (2d) 103 (Robinson); Re Kimberley-Clark of Canada Ltd. and International Chemical Workers, Local 813 (1972), 1 L.A.C. (2d) 44; Re Corporation of the County of Norfolk and London and District Building Service Workers Union, Local 220 (1972), 1 L.A.C. (2d) 108 (Palmer); Re Notre Dame Integrated School Board and Newfoundland Teachers Association (1979), 22 L.A.C. (2d) 286 (Harris); Re Falconbridge Nickel Mines Ltd. and Sudbury Mine, Mill and Smelter Workers (1982), 4 L.A.C. (3d) 274 (Saltman); Re U.A.W., Local 112 and DeHavilland Aircraft of Canada Ltd. (1971). 22 L.A.C. 159 (Weatherill); Re Union Gas Ltd. and Oil, Chemical and Atomic Workers International Union (1978), 21 L.A.C. (2d) 437 (Hinnegan); Re International Woodworkers of America, Local 1-207 and Zeidler Forest Industries (1978), 84 D.L.R. (3d) 482; The Budd Automotive Company and United Auto Workers, Local 1451 (February 1972), Lab. Arb. News, April 1972 (Brown); Re Loblaw Groceteria and Union of Canada Retail Employees C.L.C. (1973), 3 L.A.C. (2d) 325; Re Calgary Public Library and C.U.P.E., Local 1169 (1979), 19 L.A.C. (2d) 230.

DECISION: 85-64

Eastern Shore Memorial Hospital **AND** Nova Scotia Union of Public Employees

Prof. Peter Darby, Arbitrator

Ronald Stockton, for the union
Robert Cook, for the employer
July 18, 1985

ISSUE: Seniority: Scope of Arbitral Review 6:3100; Seniority: Rights of Recall 6:2354; Seniority: Reduction of Hours 6:2210; Organization and Direction of the Workplace: Work Hours and Shifts 5:3100; Jurisdiction of the Arbitrator: Secondary Sources 2:2200, Promissory Estoppel 2:2210.

CIRCUMSTANCES: The question is whether a reduction in workhours of one part-timer, in favour of another less senior part-timer, constituted a layoff not equally distributed, and not based on seniority. The grievor's case was that the hospital had reduced her part-time hours of a laboratory and x-ray technician, giving them to a less senior part-time technician, violating an oral agreement made by the supervisor in 1977 and six years' subsequent practice. At issue is the time worked in x-ray every other Saturday.

AWARD: The grievance failed. The arbitrator questioned whether promise or practice could give the employee a right of first refusal. Even if the promise were proven, the employer's conduct or representation (if written) might be insufficient for estoppel. He found no discriminatory intent or manipulation of hours. Grievance on reduction of hours did not meet the necessary criteria, since this particular case concerned stand-by hours, not regular part-time hours.

A cut in regular full-time or part-time might be successfully grieved on seniority, despite a management rights clause, and despite a guaranteed part-time minimum or fixed hours.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, pp. 280-1; University Hospital, Saskatoon, Saskatchewan v. Service Employees International Union, Local 333 U.H. (Q.B. Sask. f2340, September 13, 1983); Charlotte Eleanor Englehart Hospital and Service Employees Union, Local 210 (1980) 25 L.A.C. (2d) at p.30; Re Ballycliffe Lodge and Service Employees Union, Local 204 (1984) 14 L.A.C. (3d) 37 at pp. 43-4; High River General Auxillary Hospital & Nursing Home District No. 11 and United Nurses of Alberta, Local 280 (March 6, 1984) unreported (Hawco); Hawker Siddeley Canada Inc. Trenton Iron Works Division v. United Steelworkers of America, Local 1231 (1983) 59 N.S.R. (2d) 29; N.S.G.E.U. (Milligan and Terrio) and Civil Service Commission (June 27, 1985) unreported (Darby).

DECISION: 85-65

Nova Scotia Forest Industries (Mill Division) AND Canadian Paper Workers Union, Local 972

Bruce P. Archibald, Arbitrator

Raymond Larkin, for the union
Eric Durnford, for the employer
July 22, 1985

ISSUES: Discharge and Discipline - Disciplinary Penalties - Mitigating Factors - Rehabilitation Potential 7:4422; Use of the Prior Record 7:4314; Alcoholic Beverages 7:3560; The Arbitration Process - The Hearing: Preliminary Matters - Onus or Burden of Proof 3:2400.

CIRCUMSTANCES: The operator of a motorized log-carrier was sent home by the supervisor, who believed that he was drunk. The operator had a previous record of alcoholism but had been sober for seven years. Safety in the woodroom area was a major concern at the time, since several serious accidents had occurred there. The supervisor noticed two physical signs: he was "splurting" words and could "smell it (drink) off him". Aware that the burden of proof of impairment lies on management, the supervisor sought other witnesses. So did the operator, who was a shop steward. He admitted having "fallen off the wagon" that day and had been unexpectedly recalled for the night shift. In settling another shop problem he had not eaten. However, he claimed that this problem and arguing with the supervisor were responsible for his speech, and that he was "not under the influence". Next day, the company suspended him for two weeks without pay, on the basis of the supervisor's evidence and his previous record. Even at that time, evidence of the management eyewitness called in by the supervisor could have been cited to support either side's contention. The grievor asked that the discipline be rescinded and that he be reinstated with full pay.

AWARD: The grievance succeeded in large part. The arbitrator wiped out the suspension, reinstating with pay except for the shift when the operator was sent home. He supported the supervisor's "reasonable" belief and concern with safety, as well as a shop steward's rights to argue forcefully. He disagreed with assertions that the supervisor and higher managers were out to prove a case, and that the main witness had backed down in later testimony. He distinguished sharply between "having a drink" and being "under the influence" contrary to mill rules, which would have been grounds for severe discipline. The grievor was ill-advised to have taken a drink after receiving an unexpected call-back. But expert testimony from a neuropsycho-pharmacologist was that any alcohol consumed the night before, or even four hours before the shift, would have been eliminated in a man of this size by work time; though there might still be a "strong smell: from inactive ingredients, especially where metabolic tolerance had been developed. This clinical finding, together with ambiguities in other evidence, led the arbitrator to conclude that the grievor was not under the influence that night, and not unfit to work. He complimented the company for its rehabilitation program, but chided the employer for not seeking all the facts the next day, nor paying sufficient attention to those which might support the grievor. Since the supervisor's judgment was reasonable given the facts at his disposal, grievor was not to receive pay for the lost shift.

AUTHORITIES: Re Federal Local 24529 and Engelhard Industries of Canada Ltd. (1970), 22 L.A.C. 285; Re United Brewery Workers and Dow Kingsbeer Brewery Ltd. (1958) 8 L.A.C. 198; Re Brotherhood of Electrical Workers, Local 911 and Windsor Utilities Commission (1958) 8 L.A.C., 328; Re Rockwell International of Canada Ltd. and United Auto Workers, Local 1967 (1967), 23 L.A.C. (2d) 324 (Ellis).

DECISION: 85-66

Mason's Limited AND Retail Wholesale and Department Store Union, Local 596

Frank Elman, Arbitrator

Bernard Campbell, for the union
Dan Fudge, for the employer
July 15, 1985

ISSUE: Compensation: Vacation Benefits - Purpose and Entitlement 8:3210; Compensation: Computation of Vacation and Vacation Pay 8:3230; Compensation: Scheduling Vacations 8:3240; Delay 2:3210; Time Limits 2:32128; Seniority: Rights of Recall 6:2354.

CIRCUMSTANCES: The grievance raised three questions.
1) recall from layoff in order of seniority
2) full vacation pay by seniority whether employees are laid off or not
3) whether management has a right to restrict the times when vacations are taken, and if so, whether management personnel are bound by the same restrictions

A laid-off warehousemen grieved that he had not been recalled in January, and that this lowered his vacation pay. The union made policy grievances of the vacation pay and management's ban on vacations starting July 1, "the busiest week in the year". In previous years the employer had paid four percent of gross wages as vacation pay. The union claimed full pay entitled by seniority for every employee, stating that this was a longstanding issue aggravated by harder times and longer layoffs. The union also grieved that department managers had disrupted work last year by taking vacations in the first week of July.

AWARD: The union's policy grievances succeeded, the one-week vacation ban was to bind senior management as well as the bargaining unit, vacation pay by seniority required, and union members given priority. Employees who had accepted less without complaint had waived their right to full pay for previous years. The individual grievance on recall failed.
1) The recall grievance was dismissed on the ground that the warehousemen did not have the specific ability required for the job: driving as well as warehouse work.
2) Employees were entitled to full vacation pay by seniority, even if laid off almost as soon as they attained this status, i.e. on completing probation. There was no specific clause disentitling layoff time as continuous time in service. The arbitrator found that the union had slept on this right for several years and granted no retroactivity.
3) In a preliminary decision rendered before July 1 ("the busiest week in the year", on the company's evidence) the arbitrator upheld the union grievance, requiring senior managers to observe the same ban on vacations in that week as imposed on members of the bargaining unit. The one-week ban for work efficiency was undoubtedly a management

right, but first choice in vacation time was the prerogative of bargaining unit members in order of union seniority. Minor management staff such as secretaries were not restricted, since their absence would not affect company efficiency.

AUTHORITIES: Re Sudbury Broadcasting Co. Ltd. and National Association of Broadcast Employees and Technicians (1972) 1 L.A.C. 130; Brown and Beatty; Canadian Labour Arbitration , pp. 200, 202, 585, 593; Re Sola Basic Ltd. and International Association of Machinists, Local Lodge 1168, 11 L.A.C. (2d) 328; Gulf Oil Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-593, L.A. April 1975; Palmer, Collective Agreement Arbitration in Canada, p. 499; on recall, Palmer, p. 509, Brown and Beatty, pp. 298, 307; Union Carbide Canada Ltd. (1967), 18 L.A.C. (Weiler); Carling Breweries Ltd. (1968), 19 L.A.C. 110.

DECISION: 85-67

Construction Association Labour Management Bureau Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Brian Johnston, for the employer
July 23, 1985

ISSUE: Organization and Direction of the Workplace: Assignment of Bargaining Unit Work to Non-Employees - Contracting-out 5:1300; Remedy 2:1424; The Arbitration Process: Statutory Authority 3:4100; Compensation: Incentive Rates - Establishment and Termination 8:2210; Compliance Orders 2:1450.

CIRCUMSTANCES: Yorkdale Drywall (a member of the Bureau) a non-union employer, had encouraged at least four drywall workers to form partnerships and work as subcontractors. The union grieved that this violated the ban on piecework in the Bureau's collective agreement, depriving members of work, and demanded legal remedy by payment at union scale to the local, to be held in trust and distributed to members who would have been hired, as well as union dues and benefits.

AWARD: The grievance succeeds in the union winning full compensation for contracting-out; fails in proving piecework at the time. The arbitrator upheld the union, finding that the subcontracting was a masquerade. The partnerships had no previous legal existence, place of business, equipment or assets, and risked little loss or profit. Yorkdale had suggested their formation, supplied major equipment and materials, deducted workers' compensation, in pay and supervision treated them like employees, even allowing one partner to alternate between subcontract and employee status, and failed to grieve against the union when it ran the partners off job sites. No Yorkdale officer appeared at the hearing to contradict union claims. Company counsel's attempt to limit its liability to the seven days prior to grievance filing, as set out in the Bureau's collective agreement, was over-ruled by the arbitrator's powers under statute (s.103 of the N. S. Trade Union Act) as in previous cases.

The piecework grievance failed on the narrow ground that testimony did not provide evidence of the practice at the time the grievance covered. If such evidence had been found, then the arbitrator would have ordered Yorkdale to cease and desist.

AUTHORITIES: Re United Steelworkers of America, Local 3696 and Norton Company of Canada Limited (1953), 4 L.A.C. 1451 (Fuller); Re United Automobile Workers, Local 195 and Bendix-Eclipse of Canada Limited (1970), 21 L.A.C. 19 (Christie); Re United Automobile Workers, Local 1566 and Wean-McKay of Canada Limited (1971) 23 L.A.C. 27 (Palmer); Re Royal Ontario Museum and Service Employees Union, Local 204 (1984) 16 L.A.C. (3d) 1 (Adams); Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters & Joiners of America, Local 2486 (1975) 57 D.L.R. (3d) 199 (Ont. C.A.); Re Burrard Yarrows Corporation, Vancouver Division and International Brotherhood of Painters, Local 138 (1981) 30 L.A.C. (2d) 331 (Christie); Re McDougall Construction Limited and United Brotherhood of Electrical Workers, Local 625 (May 15, 1984) unreported (Demont); Re Millwrights and Machine Erectors, Local 1178 and Construction Association Management Labour Bureau Limited (January 12, 1983) unreported (Outhouse); Re Labourers' International Union of North America, Local 615 and BIC Enterprises Limited (November 12, 1984) unreported (Outhouse); City of Sydney v. Canadian Union of Public Employees, Local 933 (1985) 67 N.S.R. (2d) 62 (N.S.S.C., App. D).

DECISION: 85-68

Construction Association Labour Management Bureau Limited AND
International Brotherhood of Electrical Workers, Local 625

Bruce Outhouse, Arbitrator

Ronald Pink, for the union
Greig MacLeod, for the employer
July 11, 1985

ISSUE: Collective Agreement: The Object of Construction 4:2100; Discipline and Discharge: Doctrine of Culminating Incident 7:4310; Discipline and Discharge: Penalties - Warnings, Suspensions, Discharge 7:3542.

CIRCUMSTANCES: The three grievors were disciplined after particpating in an illegal work stoppage in a jurisdiction dispute at a remote mine site. They had not led or instigated the action, but they left the job without permission. The company issued a written warning to all participants, with a second written reprimand to the grievors for leaving the site. But on considering their cumulative record, the company found that two of them had received a similar reprimand two months before, and to make an example fired them, and suspended the third man for a week without pay. The union asked for reinstatement under the collective agreement, which stipulates a written reprimand for the first offense, up to a week suspension for the second, and discharge upon the third.

AWARD: Grievances partly succeeded. The language of the collective agreement was clear. The discharged men were reinstated and the one-week suspension expunged. However, in view of the offense, the reprimands remain on employment records and no compensation was allowed.

DECISION: 85-69

Extendicare (A Division of Crownx Inc.) AND Canadian Union of Public Employees, Local 1183

David J. MacDonald, Chairman; Duncan MacLean, Eric Durnford

A. Robert Sampson, for the union
John D. Plowman, for the employer
June 26, 1985

ISSUES: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline and Discharge - The Burden of Proof 7:2300, 3:2411, 3:2500; Theft 7:3310; Penalty 7:3314; Mitigating Factors 7:4400.

CIRCUMSTANCES: Three residents alleged that a worker in a nursing home had stolen money and other articles. Since they acted independently, and there was some correspondence with her work schedules, the company terminated her employment. She denied the theft and grieved.

AWARD; The grievor succeeded. The arbitrator found the theft not proven. Key witnesses had limited recall and did not appear. Two of those alleging theft also testified the grievor was a diligent, caring worker. The employer was unable to prove its case, but reinstatement would be without compensation since discharge was reasonable action at the time with the evidence then before it. This substitution took into account the employee's good service, loss of pay, and loss of reputation.

AUTHORITIES: Dalton Cartage Company Ltd. v. The Continental Insurance Co. and St. Paul Fire & Marine Insurance Company (1982), 40 N.R. 135.

DECISION: 85-70

Pierce Fisheries Limited AND United Food and Commercial Workers Local 1252, Fishermen's Union

J. A. MacLellan, Arbitrator

Ronald Pink, or the union
Terry Roane, for the employer
August 9, 1985

ISSUES: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline and Discharge - The Burden of Proof 7:2300, 3:2411, 3:2500; Fighting, Assault 7:3430; Insolent Unco-operative Behavior, Obscene Language 7:3660; Warnings, Suspensions, Discharge 7:4400; Reasonableness of the Penalty 7:4300; Mitigating Factors 7:4400; Failure to Warn 7:4416.

CIRCUMSTANCES: The grievor was fired by his fishing captain on return to port. He was the union delegate onboard, and bad feelings existed among the crew from a previous strike. Three incidents of verbal abuse, profanity and threats by the man had been reported to the captain. The captain had warned the grievor the first time, but not the second and third. The grievor asked reinstatement with pay.

AWARD: The grievor succeeds in part and is reinstated without back pay. The arbitrator noted mitigating factors: frequent profanity among and arguments among share-fishermen due to working conditions, the captain's unawareness of all the facts in each dispute, grievor's intent (in one incident concern for a sick crewman), and the appropriateness of the penalty. Nevertheless the captain's decision was reasonable and bona fide at the time.

DECISION: 85-71

Nova Scotia Forest Industries, Mill Division AND Canadian Paperworkers Union, Causeway Local 972

T. A. Cromwell, Arbitrator

Dennis Grant, for the union
Eric Durnford, for the company
July 25, 1985

ISSUES: Overtime - Burden of Proof 3:2417; Distribution of Overtime - Equitable Distribution 5:3224; Seniority 5:3222; Management Rights - Overtime 5:3210.

CIRCUMSTANCES: The union argues that when overtime is available for two consecutive days, the company, in accordance with the collective agreement, should not offer the opportunity to work both these days at once to employees, but it should deal with each day individually. The grievor was not available to work on the first day and consequently, he was denied the opportunity of working on the second day. He was available for work that day and he had more seniority than those who eventually worked the overtime. The union charges that this company procedure infringes on seniority rights. The company upholds the principle of seniority rights but maintains that it must be able to assign the overtime following a practical system, i.e. assigning two days at once.

AWARD: The arbitrator awarded in favour of the company. The clause in question in the collective agreement simply defines planned and unplanned overtime. It states that the overtime should be given on the basis of departmental seniority but nothing is said about how that overtime is to

be assigned. The method used by the company derived from practicality and not from an attempt to undermine the principle of seniority rights. The union, in stating that this clause governs the distribution of overtime is reading too much into the statement. It must be concluded that there has been no breach of the existing agreement.

DECISION: 85-72

Allen's Dairy AND Retail, Wholesale and Department Store Union, Local 515

S. Bruce Outhouse, Arbitrator

Roseanne M. Stoke, for the union
James C. Leefe, for the employer
August 19, 1985

ISSUES: Statutory Holidays - Holiday Falling on a Non-Working Day 8:3110

CIRCUMSTANCES: Remembrance Day, November 11 fell on a Sunday in 1984. The employer's plant was closed, as is usual for the weekend, and none of the employees were required to work. The plant was open Monday and employees worked a regular week. They were paid for the five days worked as well as eight hours holiday pay. The union argues that Remembrance Day, while officially falling on a Sunday, was 'observed' on the Monday. Consequently, plant employees should be paid six and one-half days for the week since they were required to work the five days.

The employer, however, claims that Remembrance Day is the one statutory holiday which, when it falls on the preceding Sunday, is not observed on the next day. Employees are not entitled to the extra half-day's pay.

AWARD: The grievance is dismissed. The arbitrator concluded that Remembrance Day is officially observed on November 11th, even when that date falls on a Sunday. The fact that other companies in Stellarton were seen to be observing the holiday on the Monday is most likely due to a special provision in their agreements which makes allowances for such occurances.

AUTHORITIES: Holidays Act, R.C.S. 1970, c.H-7, Section 3; Remembrance Day Act, S.N.S. 1981, c.10; Interpretation Act, R.S.N.S. 1676, c151, Section 6(I) (j); Labour Standards Code, S.N.S. 1972, c.10.

DECISION: 85-73

Carey Bros. Masonry Limited AND Construction Association Management Labour Bureau Limited

Bruce Outhouse, Arbitrator

Ronald Pink, for the company
Brian Johnston, for the bureau
August 12, 1985

ISSUES: Statutes - Applied by Boards of Arbitration 2:1200; Arbitrability - Statutory Requirement 2:1100.

CIRCUMSTANCES: The Bureau is the accredited bargaining agent for all unionized contractors in the industrial and commercial sector of the construction industry on mainland Nova Scotia. The company operates in that industry and, although it is not a member of the Bureau, it is bound by any collective agreement set up by that organization. Accordingly the company is obliged to contribute to the Industry Improvement and Administration Fund which sends half the monies to the union and half to the Bureau. The company refuses to pay the Bureau's half. The issue before the arbitrator is whether the Bureau can utilize the grievance and arbitration procedure to force the company to make its payments to the Fund.

The company argues that the pertinent section of the Trade Union Act for grievance and arbitration procedures applies only to disputes between employers or employers' associations and unions or union members. The Act, according to the Bureau, does not exclude this process for the settlement of disputes of this kind. In addition, the collective agreement expressly allows for the utilization of arbitration procedures.

AWARD: The grievance succeeds and the company is ordered to pay the Bureau the amount owing to the Industry Improvement and Administration Fund.

The definition of the word 'dispute' in section 1(1)(j) of the Act states that arbitration is to be used to settle disagreements between the employer or employer organization on the one hand, and the employees or their bargaining agent, on the other. Based on this the Bureau must fail in its claims that the Act allows for arbitration of this case.

However, the arbitrator finds that even though the arbitration provision in the collective agreement appears to be contrary to the Act in this respect, it is nevertheless valid and operative since the pertinent section of the Act does not expressly deny the provision. Moreover, while the arbitrator is appointed pursuant to the Act and not the collective agreement, the latter states that technical or procedural matters shall not allow the grievance to fail. The arbitrator's authority to hear the case is affirmed.

DECISION: 85-73B

Carey Brothers Masonry Limited AND Construction Association Management Labour Bureau Limited, S. Bruce Outhouse, and the Hon. David Nantes, Minister of Labour and Manpower

Mr. Justice Hallett, N.S.S.C.(T.D.)

R. A. Pink, G. N. Forsyth, for the company
B. G. Johnston, for the Bureau
S. Bruce Outhouse, on his own behalf
Gordon Gillis, for the Minister of Labour
January 16, 1986

ISSUES: Judicial Review: Grounds for Review - Excess of Jurisdiction 1:5300; Jurisdiction: Sources - Collective Agreement 2:1200, Statutes 2:1100, 2:2100; Interpretation: Words and Phrases - Collective Agreement 4:1100.

CIRCUMSTANCES: This is an application to quash an arbitrator's award (reported as 85-73, Carey Bros. Masonry Limited and Construction Association Management Labour Bureau Limited, Bruce Outhouse, August 12, 1985) which directed the company to pay to the Bureau a five cent per hour levy under the provisions of Article 32 of a collective agreement between the Bureau and a local of the International Union of Bricklayers and Allied Craftsmen. The arbitrator found while he did not have jurisdiction under s.103 of the Trade Union Act, the Act did not displace the jurisdiction given by the collective agreement to hear grievances which fall outside the ambit of disputes as defined by s.1(1)(j) of the Trade Union Act. The arbitrator found that he had the authority under Article 32.05 of the collective agreement to award the relief sought by the Bureau. In the opinion of the arbitrator, the establishment of funds such as the Industry Improvement and Administration Fund in question here, is a legitimate subject of collective bargaining.

AWARD; The application succeeds; the company need not pay the levy to the Bureau. The arbitrator exceeded his jurisdiction in deciding issues arising out of an Article that was not properly part of a collective agreement as defined in the Trade Union Act in that the Article does not relate, directly or indirectly, to terms and conditions of employment. The arbitrator did not have jurisdiction under s.103 of the Act or under Article 32 of the collective agreement.

AUTHORITIES: Re Mechanical Contractors Association of Ottawa and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 7 (1973), 4 L.A.C. (2d) 50 (Abbot); Re Mechanical Contractors Association of Ottawa and J. G. Rivard Ltd. (No. 1), (1976) OLRB Rep. 540; Re Mechanical Contractors Association of Ottawa v. J. G. Rivard Ltd. (1977), 90 D.L.R. (3d) 585 (Ont. H.C.); Re J. G. Rivard Ltd. and Michel Rivard Plumbing Ltd. and Mechanical Contractors Association of Ottawa and Mechanical Contractors Association of Ontario (No. 2), (1981) 3 Can LRBR 259 (Ont.); Re American Cargage Agencies Ltd. and Transport Labour Relations, (1981) 2 Can LRBR 104 (B.C.); Re International Union of Operating Engineers, Local 793 and Employer Bargaining Agency and MacGregor Crane Service Ltd., (1979) OLRB Rep. Aug. 777; Re Ontario Sheet Metal and Air Handling Group v. Acme Plumbing and Heating (1983) OLRB Rep. Nov. 1769; Re Millwrights and Machine Erectors, Local Union 1178, and Construction Association Management Labour Bureau Limited (January 12, 1983) unreported; Re Labourers' International Union of North America, Local 615 and BIC Enterprises Limited (November 12, 1984), unreported; Re United Brotherhood of Carpenters and Joiners of America, Local 83 and Construction Association Management Labour Bureau Limited (July 23, 1983), unreported; Trade Union Act.

DECISION: 85-74

Sivaco Maritimes Division/IVACO Inc. AND United Steelworkers of America, Local 8679

Bruce Outhouse, Arbitrator

Raymond Larkin, for the union
David Bright, for the company
August 15, 1985

ISSUES: Discipline and Discharge: Evidence - Burden of Proof 3:2411; Union: Activity and Business - On Company Time 9:1400; Discipline and Discharge: Grounds for - Absence from Work - Failure to Notify Employer 7:3110, Lateness 7:3140.

CIRCUMSTANCES: Due to his attendance at the arbitration case of a fellow employee, the grievor was late for work. The employer, claiming that the absence was without permission, issued the grievor with a written warning for tardiness. The union claims that the grievor did obtain permission and that this warning was unjustly imposed. It maintains that the grievor's case was being used as a test and that the real issue was that the employer felt that the union had too many representatives at the hearing. The grievor was the third union representative in attendance.

The grievor was in attendance as a witness, and in this capacity he did not require permission from the employer for lost work time. Indeed, the union contends that as as official representative of the union he was entitled to attend the hearing in any case.

AWARD: The grievance succeeds; the employer is directed to remove the written warning from the grievor's file. The arbitrator ruled that the onus of proof justifying the written warning lay with the employer and the not the grievor. The latter was originally meant to testify at the hearing but it was decided, late in the day, that his testimony was not necessary. As soon as it became apparent that the hearing would run later than thought the grievor called the plant to advise that he would be late in reporting for work. It was impossible for the grievor to obtain permission from his own foreman, as the employees' rules stipulate, since that supervisor had not yet reported for work.

With regards to the matter of the number of representatives the union is entitled to have in attendance , the arbitrator ruled the union was entitled to two representatives at grievance meetings with the employer. The issue of whether this article also applied to arbitration hearings was expressly left aside.

AUTHORITIES: Trade Union Act, S.N.S., 1972, c.19.

DECISION: 85-75

Concord Metal Erectors Ltd. and Aztec Metals Limited AND Sheet Metal Workers International Association, Local 409

Milton J. Veinot, Arbitrator

August 14, 1985

ISSUES: Union: Security - Check-off 9:1200; Supplying Employees 9:2000.

CIRCUMSTANCES: A technical violation of the collective agreement occurred when the employer did not use the union hiring hall to employ the five employees named in the grievance. Each of the employees had been with the company a number of years at the time of the arbitration. The company does not contest the charge of violating the agreement and is willing to abide by any award imposed. The main reason for taking this case to arbitration lies in the fact that the company feels it has been singled out by the union as the only violator of the agreement. The union, on the other hand, wants to ensure that the technical requirements of the agreement are followed with regards to union security. Both parties feel that the hearing of this case will settle any past disagreements and will allow cordial relations to proceed in the future.

AWARD: The grievance succeeds. It was clear from the admissions that a technical breach of the collective agreement has occurred. The company is ordered to comply with the terms of the agreement with respect to financial renumeration to the employees and the union if it has not already done so.

DECISION: 85-76

Seaboard GM Diesel Limited AND International Union of Operating Engineers, Local 721B

J. A. MacLellan, Arbitrator

Edgar Doull, for the union
Terry Roane, for the employer
August 28, 1985

ISSUES: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline and Discharge - The Burden of Proof 7:2300, 3:2411, 3:2500; Theft 7:3310; Penalty 7:3314; Warnings, Suspensions, Discharge 7:3532; Reasonableness of the Penalty 7:4300; Mitigating Factors 7:4400.

CIRCUMSTANCES: A diesel mechanic worked on his own truck during lunch hour, with permission. However, the company had experienced thefts. When the worker was found to have put parts in his own vehicle while charging them to a customer, the manager fired him.

AWARD: The grievor succeeded in part: reinstatement, but without back pay. The arbitrator found that the intent was not to steal or falsify records, since the mechanic was to install such parts later in the customer's vehicle. The misuse of parts was temporary, though wrong. The worker had a previous, unrelated warning. In view of the seriousness of theft, the company's action was justified at the time.

DECISION: 85-77A

The Town of Kentville AND the Kentville Police Association, Local 107 of the Police Association of Nova Scotia

Milton J. Veniot, Chairman; Charles MacDougall, Matt MacPherson

Bruce Evans, for the union
R. Peter Muttart, for the employer
January 18, 1985

ISSUES: Arbitration of Grievances in Context - Courts (wrongful dismissal cases) 1:4200; Judicial Review of Grievance Arbitration 1:5000; Jurisdiction of the Arbitrator - The Statutory Requirement 2:1100; The Collective Agreement 2:1200; Secondary Sources of Jurisdiction - Statutes 7:3544; Non-disciplinary Demotion 7:3546.

CIRCUMSTANCES: Pursuant to a N. S. Police Commission inquiry into complaints about policing, two constables were discharged and grieved for reinstatement. The town counsel challenged the arbitrator's jurisdiction, on grounds that the collective agreement reserved exclusive rights in hiring, discipline and discharge to the town; and that the N. S. Police Act made disciplinary matters not arbitrable. He averred that the Police Act and its Regulations 7, 37 and 64(b), 65 overrode the province's Trade Union Act s.40(1), and the Arbitration Act s.2. On this ground, counsel refused to participate in the hearing, obtained a temporary injunction, and appealed to the Supreme Court of Nova Scotia.

AWARD: The SCNS appeal failed, hearings resumed, and the arbitrator found the right to grieve. The cases of the two grievors were heard separately, and separate awards, which follow, were made.

AUTHORITIES: Trade Union Act; Police Act; Arbitration Act R.S.N.S. 1967, c.12; Volvo Canada Limited v. International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 720 (1979), 99 D.L.R. 913; International Association of Firefighters, Local 268 v., Halifax (1982), 52 N.S.R. 299 (S.C.N.S., Appeal Division); Martin v. Attorney General of Nova Scotia (1980), 39 N.S.R. (2d) 325 (S.C.N.S.).

DECISION: 85-77B

The Town of Kentville AND The Kentville Police Association, Local 107 of the Police Association of Nova Scotia

Milton J. Veinot, Chairman; Charles MacDougall, Matt MacPherson

Bruce Evans, for the union
R. Peter Muttart, for the employer
June 26, 1985

ISSUES: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline and Discharge - Collective Agreement Limitations 7:1300; Burden of Proof 7:2300, 3:2411, 3:2500; Unsuitability 7:3530; Warnings, Suspensions, Discharge 7:3532; Reasonableness of the Penalty 7:4300; Failure to Warn 7:3542; Disciplinary Demotion 7:3544; Non-disciplinary Demotion 7:3546; Failure to Co-operate 7:3580; Use of the Prior Record 7:4314; Mitigating Factors 7:4400.

CIRCUMSTANCES: The town fired the grievor under Regulation 65 of the Police Act, on the recommendation of a N. S. Police Commission inquiry. The union made a policy grievance that Regulation 65(b) provided only a non-disciplinary dismissal, and questioned both procedures and hearsay evidence allowed by the inquiry. It asked full reinstatement.

AWARD: The grievance fails. The arbitrator stated he was not bound by the Commission's conclusions, and canvassed the evidence, rejecting evidence of racist attitudes, for instance, as insufficient. The grievor was found to be zealous, and careless of proper procedures. His actions were not corrected by the employer, who had thus slept on any right to discipline.
However, this lack of progressive discipline weakened the grievor's position, since it left him in a position where his lack of "professional" standards in some incidents was uncorrected over time. Regulation 65 was not part of the disciplinary code covering specific misconduct; its wider powers allowed for dismissal on such grounds as "incapability" and "non-performance" if these were proven before a Commission. The grievor's dismissal was non-disciplinary. The Town was within its legal powers to dismiss, and had just cause.

AUTHORITIES: Police Act and Regulations; Re Edith Clavell Private Hospital and Hospital Employees Union, Local 180 (1982); 6 L.A.C. (3d) 229; Martin v. Attorney General of Nova Scotia (1980) N.S.E. (2d) 325 (Sup. Ct.) per Morrison J.; Wallace v. Davis per Riddell J.A.

*The Police Association of Nova Scotia has asked the Supreme Court to review this decision. The hearing is scheduled for November 13, 1985 in Halifax.

DECISION: 85-77C

The Town of Kentville AND The Kentville Police Association, Local 107 of the Police Asociation of Nova Scotia

Milton J. Veinot, Chairman; Charles MacDougall, Matt MacPherson

Bruce Evans, for the union
R. Peter Muttart, for the employer
August 26, 1985

ISSUES: Jurisdiction of the Arbitrator - Reinstatement and Substitution of Penalty 2:1470; Discipline and Discharge - The Burden of Proof 7:2300, 3:2411, 3:2500; Untrustworthiness and Conflict of Interest 7:3330; Warnings, Suspensions, Discharge 7:3532; Reasonableness of the Penalty 7:4300; Discipline and Discharge - Disciplinary Demotion 7:3544; Non-disciplinary Demotion 7:3546; Failure to Co-operate 7:3580; Use of the Prior Record 7:4314; Mitigating Factors 7:4400; Union Rights and Liabilities - Disciplinary Standards 9:1530.

CIRCUMSTANCES: The grievor, president of the local, was dismissed by the town, on the ground that he had lied or obstructed the Commission inquiry, had obtained and used confidential RCMP records in an attempt to discredit witnesses (including officials of the town) against the police, was unsatisfactory in his work and attitudes, and had destroyed the trust town officials placed in him. The union asked for full reinstatement on grounds of wrongful dismissal.

AWARD: The grievance succeeds in part. The arbitrator found that the Commission did go somewhat beyond the evidence in suggesting that he lied, and had misused criminal files. There was evidence of group action, but without proven personal misconduct. The grievor's actions were demanded by the whole union, coloured by a previous labour-management dispute. In the past, the town and chief had failed to discipline him and others for improper procedures such as routine browsing in computerized criminal files. The penalty of discharge after 8 years of weak discipline and good service would be too harsh. The arbitrator found unconvincing and self-contradictory some allegations made by citizens at the provincial inquiry, and by a recent police personnel report. In dismising the grievor the town had exceeded the legal scope allowed under Regulation 65 since the provincial Commission had recommended demotion only. The grievor was reinstated, with the arbitrator's jurisdiction preserved if parties could not agree on financial remedies.

DISSENT (Matthew J. MacPherson): The grievance fails. The town correctly terminated an employee who had demonstrated his unsuitability; this termination was consistent with the prerogative of management. The grievor has demonstrated serious shortcomings as a police officer, and this unsuitability and his apparent lack of credibility are cited in the dissent.

AUTHORITIES: Police Act and Regulations, Re Edith Clavell Private Hospital and Hospital Employees Union, Local 180 (1982), 6 L.A.C. (3d) 229; Martin v. Attorney General of Nova Scotia (1980) N.S.R. (2d) 325 (Sup. Ct.) per Morrison J.; Wallace v. Davis per Riddell, J. A.; McWilliams, Canadian Criminal Evidence, 2nd ed., 1984, p.73ff; Sopinko and Lederman, The Law of Evidence in Civil Cases, p. 529; Brown and Beatty, Canadian Arbitration , 2nd ed., p. 395-398.

DECISION: 85-77D

Town of Kentville AND Kentville Police Association, Local 107 of the Police Association of Nova Scotia

Milton J. Veinot, Chairman

September 13, 1985

ISSUES: Board of Arbitration: Power - Costs 2:1430; Costs: Power of Board to Award 2:1430.

CIRCUMSTANCES: The arbitrator has been asked to formally decide the appropriate division of costs for the arbitration board. The hearing involved the dismissal of two grievors from the Kentville Police Department and it was a lengthy and involved case.

AWARD: The arbitrator directs that each of the parties shall bear one-third of the cost, that is, the Minister, the employer or the employer's organization and the trade union. This award is in agreement with the appropriate sections of the Trade Union Act and the collective agreement. The finding is based on the equal degrees of success of all parties.

AUTHORITIES: Trade Union Act, S.N.S. 1972, c.41(2)(3).

DECISION: 85-78

Maloney Steel Limited AND International Association of Bridge, Structural and Ornamental Ironworkers, Local 752 (Maritimes)

Bruce Outhouse, Arbitrator

Raymond Larkin, for the union
Geoffrey Saunders, for the employer
September 5, 1985

ISSUES: Extrinsic Evidence 3:4400; Interpretation: Ambiguity 3:4400; Past Practice 3:4430; Travel Allowance 8:3430; Wages: Withholding Wages 8:1420.

CIRCUMSTANCES: The grievors, ironworkers at a mine construction site, all were receiving a travel time allowance under the collective agreement with the employer. One Friday they left work early to travel to their homes. None had requested permission previously to do this, though they did advise their foremen before they left and no objections were made. The employer pro-rated the travel allowances of the grievors for the day they left early on the next payment.

The union argued that in pro-rating the travel allowances the employer breached the collective agreement. It argued firstly that per the agreement, absenteeism results in forfeiture of the allowance only when an employee fails to report for work and is absent the entire day. Secondly, the union maintained that it was common past practice for iron workers to leave work early on Friday if there was no weekend work and their homes were far distant from the site, and that travel allowances had never been reduced in consequence.

The employer argued that the proper interpretation of the relevant articles in the agreement was that the travel allowance was to be forfeited by absence for part of day, and that to rule otherwise was to make one of the articles redundant.

AWARD: The grievance succeeds. The collective agreement contained a latent ambiguity re the meaning of the phrase "absenteeism on any working day". Past practice was therefore admissable evidence to aid interpretation, and was to the effect that travel allowances were not forfeited or pro-rated when employees left early on Friday to travel home.

AUTHORITIES: Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Inc.) et al (1968), 3 D.L.R. (3d) 161 (Ont. H. C.); International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 720 v. Volvo Canada Limited (1977), 18 N.S.R. (2d) 592, reversed on other grounds [1980] 1 S.C.R. 178; Trade Union Act, S.N.S. 1972, c.19, as amended.

DECISION: 85-79

Municipality of the County of Cape Breton AND Canadian Union of Public Employees, Local 1545

Bruce Outhouse, Chairman; Kevin MacNeil; Robert Street

Charles Cormier, for the union
David Muise, for the employer
September 10, 1985

ISSUE: Interpretation: Words and Phrases 4:2100; Intention of the Parties 4:2100; Skill and Ability: Arbitral Review - Senior Employee if Relatively Equal 6:3220.

CIRCUMSTANCES: The grievor applied for a job position posted by the employer. The position was awarded to another applicant junior to the grievor in seniority but considered by the selection committee to have the greatest ability among the applicants. The union alleged that the employer had thereby violated article 14.04 of the collective agreement which, it argued, provided that the senior applicant to a job was entitled to it providing he or she is qualified to do it. Alternatively the union argued that even if the article set up a contest as to ability and qualifications, the grievor had in fact shown herself equal to the successful applicant. The employer argued that article 14.04 was a "relative ability" clause, setting up a competition among job applicants as to ability and qualifications, and that seniority came into consideration only to break a tie. Alternatively the employer argued that the grievor had not shown she was equal in ability and qualifications to the successful applicant.

AWARD: The Board accepted neither the union's nor the employer's interpretation of article 14.04. The article was neither a "minimum requirements" seniority clause nor a "relative ability" clause but a hybrid. The intention of the parties was that the job position be awarded to the applicant with the greatest ability and seniority, with equal weight given to both in the selection process. The employer failed to give weight to seniority in this case. The Board directed the employer to repost the position and conduct a new competition.

AUTHORITIES: Re Island Telephone Company Ltd. and International Brotherhood of Electrical Workers, Local 1030 (1983), 8 L.A.C. (3d) 132; Re Corporation of District of Maple Ridge and Canadian Union of Public Employees, Local 622 (1979), 23 L.A.C. (2d) 85 (Hickling); Trade Union Act, S.N.S., 1972, c.19. as amended.

DECISION: 85-80

Sivaco Maritimes Ltd. AND United Steelworkers of America, Local 8679

R. Lorne MacDougall, Q.C.
September 16, 1985

ISSUES: Interpretation: Specific Versus General Provisions 4:2100; Skill and Ability 6:3000; Seniority: Recall 6:2354.

CIRCUMSTANCES: The grievor worked at various jobs for the employer over a six year period, interrupted by two periods of lay-off. During the last such lay-off, several jobs were filled by employees junior to the grievor in seniority. The grievor claimed that in not recalling him to any of those jobs the employer failed to recall him from lay-off in reverse order of seniority as required by the collective agreement. He claimed compensation from the date of the first job filled by a junior employee to the date of his actual recall.

The employer argued that the grievor was not qualified for any of the jobs that became available during his lay-off prior to the time he was recalled.

AWARD: The Board found that the grievor was qualified to do one of the jobs which had been filled on recall by a junior employee during the period in question. The grievor was held to be at least relatively equal in qualifications to the junior employee who filled the job. The employer thus violated the collective agreement. The grievor was entitled to receive the wages he would have earned in the job during the period it was filled by the junior employee to the date of his recall.

AUTHORITIES: Re U.A.W. and Weststeel Products Ltd. (1960), L.A.C. 199; Brown and Beatty, Canadian Labour Arbitration (2d), p. 195; Palmer, Collective Agreement Arbitration in Canada (2d), pp. 130-1; Re Hoover Co. Ltd. and U.E.W. (1981), 29 L.A.C. (2d) 162; Re Textile Workers Union and Lady Galt Towels Ltd. (1969) 20 L.A.C. 382.

DECISION: 85-81

Nova Scotia Civil Service Commission AND Nova Scotia Government Employees Union

Peter E. Darby, Arbitrator

Ronald A. Pink and Kim Turner, for the union
Alison Scott, for the employer
July 15, 1985

ISSUES: Job Posting: Posting Procedure 5:2520; Fair and Reasonable 5:2520; Jurisdiction: Sources - Submission to Arbitration 2:1300; Evidence: Burden of Proof - Skill and Ability 3:2413; Skill and Ability: Burden of Proof 6:3200; Arbitral Review: Senior Employee if Relatively Equal 6:3220; Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: The grievor, a printer, applied for the position of supervisor at the shop where he worked. The job was awarded to an applicant junior to the grievor who had applied after the posted closing date. The union argued that as the grievor was senior to and as equally qualified as the successful applicant, he should have been awarded the position. The grievor further alleged lack of impartiality on the part of the job selection committee.

AWARD: The grievance succeeds. The Article in the collective agreement governing job competitions is a "seniority when equal" clause, and the grievor has proved himself at least as relatively equally qualified for the job as the successful junior applicant. The criteria used by the job selection committee were unfair and unreasonable. The employer is directed to repeat the job posting process and to reappoint a selection committee excluding two specific members of the former committee.

AUTHORITIES: Re Minuts and Doran (1982), 52 N.S.R. (2d0 674 (N.S.S.C.T.D.), Clarke J.); Nova Scotia Government Employees Union (Ferguson) and Civil Service Commission (March 8, 1985) (Darby, unreported) at p.9; Brown & Beatty, Canadian Labour Arbitration, (2nd ed.) at p.309, 301-2, 328.

DECISION: 85-82

Glace Bay General Hospital AND Canadian Brotherhood of Railway, Transport and General Workers, Local 607

Frank L. Elman, Q.C., Arbitrator

Thomas Barron, for the union
Robert Cook, for the employer
September 13, 1985

ISSUES: Estoppel 2:2200, 2:2200; Alteration of Wage Rates 8:1400; Interpretation: Intention of the Parties 4:2100; Job Classifications and Descriptions: Creation or Revision - Wage Structure 5:2400, 8:1400; Wages - Rates for New and Revised Classifications 5:2440, 8:1000.

CIRCUMSTANCES: The grievor seeks restitution for failure to receive a 5% pay raise increase and premium as negotiated by the union with the employer. Because of employment reclassification, the terms of a new collective agreement had the effect of reducing the 5% increase to 4% and the premium from $2,000 to $660 for the grievor's category. It is argued that this reduction only applied to new staff members and that the grievor should continue to receive pay and premium on the higher scale. The grievor further seeks to employ the doctrine of estoppel as the employer's accountant had mistakenly stated that the reclassification would not reduce the grievor's pay rates.

AWARD: The grievance fails. The employer carried out the terms of the renegotiated collective agreement which allowed for reduction of pay and premium for the grievor's job category. The terms of the contract are clear and there can be no substitution for them. Also, the grievor cannot succeed on the grounds of estoppel as the doctrine can only operate as a "shield" and not as a "sword".

AUTHORITIES: Collective Agreement Arbitration in Canada (2nd ed.), p. 150.

DECISION: 85-83

Glace Bay Community Hospital AND Canadian Brotherhood of Railway, Transport and General Workers, Local 607

Judge Robert F. Ferguson, Arbitrator

Thomas Barron, for the union
Philip Veinotte, for the employer
August 25, 1985

ISSUES: Fairness: Vacancy 5:2520, Filling 6:3000; Good Faith: Vacancies, Transfers, Promotions 5:2300; Job Posting 5:2520, 6:2310, Fair and Reasonable 5:2520; Organization of the Workplace 5:2500; Promotion, Demotion and Transfer: Reasonableness 6:3100; Reasonableness: Interpretation 4:2100; Job Posting 6:2310.

CIRCUMSTANCES: The union alleged that the employer violated the collective agreement in the manner in which it filled a vacant position. Notice of the job was posted and the position was filled by an applicant who was not a member of the bargaining unit, although applications were received from "present" employees. The union argues first, that the collective agreement excluded initial consideration of non-employees, and second, that even if outside applicants could be considered, the employer made its decision in a manner that was discriminatory and unreasonable.

AWARD: The grievance succeeds. Although the collective agreement indicates preference should be given to present employees it does not specifically exclude non-employees from consideration. However, it is determined that the employer did not excerise its judgment reasonably and fairly; it failed to give proper and complete consideration to a present employee. It is open to the arbitrator to test the merits of managerial decisions against a standard of reasonableness.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (1977), p. 297 (254).

DECISION: 85-84

Lunenburg County District School Board AND Canadian Union of Public Employees, Local 1441

Judge J. A. MacLellan, Arbitrator

Raymond Hill, for the union
Donald McDougall, Q.C.; R. Camille Cameron, for the employer
September 24, 1985

ISSUES: Discipline and Discharge: Grounds for - Attitude 7:3580; Refusal to Obey Instructions 7:3610, 7:3612; Work Performance: Culpable Incompetence 7:3510; Unsuitability 7:3530.

CIRCUMSTANCES: The grievor, a school custodian for five years, was dismissed for unsatisfactory performance of his job. During the period of employment the grievor was given several written and verbal warnings regarding his poor attitude and behaviour and his failure to complete work assigned to him. Despite being given assistance, additional training and extra time in which to complete his tasks, the grievor failed to improve his performance. It was his contention that he could not have completed all of his duties as the workload was too heavy. He seeks reinstatement with full seniority benefits and remuneration for time lost since his discharge.

AWARD: The grievance fails. The employer was justified in dismissing the grievor as evidence showed he had failed to carry out the duties of his position satisfactorily. The workload was heavy but the grievor made little effort to deal with it even when given assistance. It is the arbitrator's conclusion that the grievor's attitude problem precluded reinstatement and alternative penalties. There is just cause for dismissal.

AUTHORITIES: Re Texport of Oxford Warehousing Ltd. and Teamsters Union, Local 938 (1980), 25 L.A.C. (2d) 111.

DECISION: 85-85

Cape Breton Crane Rentals Limited AND International Union of Operating Engineers, Local 721

N. M. Scaravelli, Arbitrator

Edgar Doull, for the union
Harold MacIsaac, for the employer
September 26, 1985

ISSUE: Wages: Withholding Wages 8:1420.

CIRCUMSTANCES: The union argues that the employer failed to pay wage rate increases as required by terms of collective agreements.

Following presentation of the union's case, the two parties adjourned for discussion. Settlement was reached and made in the form of an award.

AWARD: The grievance succeeds; the employer is to pay amounts claimed within 10 days and must comply with the wage rate increase of the collective agreements.

DECISION: 85-86

Municipal Spraying and Contracting Limited AND International Union of Operating Engineers, Local 721

Judge J. A. MacLellan, Arbitrator

Ronald Pink, for the union
John Plowman, Donald McDougall, for the employer
August 1, 1985

ISSUES: Arbitrability: Subject-matter Limitations 2:1200; Collective Agreement: Matters Arising Outside of 2:1200.

CIRCUMSTANCES: The jurisdiction of the arbitrator is questioned in this consideration of a preliminary objection. The employer claims that work giving rise to three grievances is "road building" and therefore not covered under the terms of a collective agreement applicable to employees in the "commercial and industrial sector". This collective agreement must apply if the arbitrator is to have jurisdiction to hear the grievance under s.103 of the Trade Union Act.

AWARD: The preliminary objection is dismissed. Upon examination of the evidence concerning the kind of work involved, it is determined that it does fall under the "commercial and industrial sector". The arbitrator has jurisdiction and will hear the merits of the matter.

AUTHORITIES: Trade Union Act (Nova Scotia), s.103.

DECISION: 85-87

Maritime Beverages Limited AND Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local 927.

R. J. Downie, Q.C., Chairman; Dennis Grant, Donald H. McDougall

Gordon Forsyth, for the union
Peter MacLellan, Marcia Ruitenberg, for the employer
August 7, 1985

ISSUES: Jurisdiction: Sources - Collective Agreement 2:1200; Estoppel 2:2220; Evidence: Admissibility - Relevance 3:4200; Burden of Proof: Skill and ability 3:2413, Types of Evidence: Extrinsic Evidence 3:4400; Past Practice 3:4430; Job Posting 5:2520, 6:2310, Bona Fides 5:2300; Vacancy 5:2510; Promotion, Demotion & Transfer: Promotion - Defined 6:2100, Remedies 6:4100; Skill and Ability 6:3000, Criteria of Ability and Qualifications 6:3300.

CIRCUMSTANCES: An employee of twelve years' standing grieved when another was promoted to mechanic after two years. The collective agreement stated that the company should promote an employee with a "reasonable trial period", a practice the company had previously followed. In the absence of provincial courses, skills had to be acquired on the job. The grievor asked for appointment to the position and back pay.

A secondary grievance alleging company bias related to union activity and personal health was dropped for lack of evidence.

The successful applicant had since 1981 been a "fill in" temporary mechanic. In 1983, although the company had budgeted for an assistant mechanic (for which the grievor would have been eligble), early retirement of a sick mechanic in mid-year left a higher job classification to be filled. The assistantship disappeared while the job posting, now for full mechanic, required performance of skills "immediately". All parties agreed that the less senior applicant was bound to get the job as described; the issue turned on the manner of posting.

Counsel for the company argued that it acted in good faith and within management rights; that production was at its seasonal peak and the junior was the only man with he "threshold" skill and ability; at that time to give the senior a year of on-the-job training was impossible; that the collective agreement does not obligate the company to provide a trial period if the applicant does not have threshold skills for the job;

finally, the union had filed no formal grievance about the 1981 "temporary" posting in which the junior acquired his skills. Union counsel objected to the last point, citing a company letter of intent promising that this posting would not affect the senior's chance to become assistant mechanic.

AWARD: The grievor succeeds in part, with no back pay but promotion to the senior position on trial for a reasonable period. The Board found no evidence of bad faith on the employer's part, but that the spirit of the collective agreement had been violated, taking notice of the union's previous protest, the letter of intent. The Board majority found company claims that a year's on-the-job was required, and that the grievor lacked skill or ability entitling him to a trial period, were exaggerated, on the basis of company evidence and its past practice.

DISSENT: McDougall argued that the company had nowhere violated the collective agreement, that the majority misinterpreted "trial period" to mean "training period" and used extrinsic evidence where no ambiguity existed in the words of the contract, thus adding to the terms of the agreement and exceeding arbitral authority. The company's letter of intent should not bind it during the "unique crisis" of replacing a full mechanic at a peak time when "first day on the job ability" was essential. The majority should have taken notice of company interest in a third candidate who did not apply, and its good faith during the job interviews.

AUTHORITIES: Re Scarborough General Hospital and Canadian Union of Public Employees, Local 1487, 23 L.A.C. (2d) 190 (July 3, 1979); Re Lake Ontario Steel Co. Ltd. and United Steelworkers, Local 6571, 10 L.A.C. (2d) 215 (July 18, 1975); Re Chicago Rawhide Products, Canada Ltd. and United Automobile Workers, Local 397, 22 L.A.C. (2d) 45 (March 6, 1979); Re Elizabeth Bruyere Health Centre and Ontario Nurses' Association, 6 L.A.C. (3d) 119 (August 30, 1982); Re Corporation of District of Maple Ridge and Canadian Union of Public Employees, Local 622, 23 L.A.C. (2d) 86 (May 9, 1979); Re Governing Council of University of Toronto and Canadian Union of Public Employees, Local 1230, 24 L.A.C. (2d) 97 (Sept. 14, 1979); Re Great Atlantic and Pacific Co. of Canada Ltd. and Canadian Food and Allied Workers Union, Local 175 and 633, 21 L.A.C. (2d) 444 (Jan. 29, 1979); Canadian Food and Allied Workers Union, Local 175 v. Great Atlantic and Pacific Co. of Canada Ltd. 76 C.L.L.C. 332 (Ont. High Ct.) Cory, J. (Nov. 4, 1976); Re Island Telephone Co. Ltd. and International Brotherhood of Electrical Workers, Local 1030 8, L.A.C. (3d) 132 (Jan. 13, 1983); Re University of British Columbia and Canadian Union of Public Employees, Local 116, 5 L.A.C. (3d) 69 (May 14, 1982); Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Local 300, 14 L.A.C. (3d) 238 (Jan. 10, 1984); Re Canadian Trailmobile Ltd. and United Automobile Workers, Local 397, 10 L.A.C. (2d) (Aug. 1, 1975).

DECISION: 85-88

Doug Burns Excavation Contracting Ltd. AND Labourers International Union, Local 1115

Judge Robert F. Ferguson, Arbitrator

Frank L. Elman, Q.C., for the union
Bernard Boudreau, Q.C., for the employer
October 1, 1985

ISSUES: Contracts of Employment: Collective Bargaining Pre-empts 2:1210; Remedies: Type of Remedy - Damages - Certainty of 2:1410, Mitigation 2:1412; Costs: Power of Board to Award 2:1430; Estoppel 2:2200; Policy Grievance: Nature of 2:3124; Delay 2:3210; Wages: Overtime Pay 8:2100; Union: Security - Check-off 9:1200.

CIRCUMSTANCES: Union officials filed a policy grievance, that the employer had avoided more than $4,000 overtime pay to eight labourers over several months, by a side agreement with them for a "rainy day bank" whereby they would receive regular hourly pay for rainy days not worked in lieu of overtime hours worked on location where jobs are scarce. They paid dues to the union based on their regular rate. The fact was admitted by both parties. The union asked that it be paid the full amount of overtime pay.

Company counsel contended (1) the union members' promissory estoppel barred them from grieving and barred the union as well; (2) that the grievance was void because not filed within seven working days of occurrence as stated in the collective agreement; (3) that award of monetary remedies should not exceed the injury suffered by the union itself, the labourers having received their regular "banked" pay. To award more would constitute punitive damages and exceed arbitral authority.

The union countered point (2) with evidence that company reports to its office were several months late, frustrating earlier action, and that the grievance was verified and filed within seven days of its cognizance of the facts, thus satisfying the time limit in the collective agreement.

AWARD: The grievance succeeds in part; the employer must pay the union its lost dues, calculated on total overtime hours. The arbitrator agreed with the company's counsel on point (3), with the union's on point (2). Because the violation was continuing and company delays frustrated earlier action, the grievance was timely and the award should cover the total overtime rather than seven working days. Point (1) was invalid: individual employees' agreements could not bar the union, a party to the collective agreement, from pursuing its rights.

AUTHORITIES: Brown & Beatty, Canadian Labour Arbitration, pp. 61-62, 74-75.

DECISION: 85-89

New Democratic Party of Nova Scotia AND Retail, Wholesale and Department Store Union, Local 1015.

Judge Leo McIntyre, Arbitrator

August 22, 1985

ISSUES: Jurisdiction: Sources - Collective Agreement 2:1200; Employee: Defined 5:1122; Seniority: Acquisition - Non-unit Employee 6:1120; Recall 6:2354.

CIRCUMSTANCES: The grievor demanded recall under the terms of the collective agreement between her union and the Nova Scotia NDP. Work was available; she claimed many years of seniority from campaign work in New Brunswick and Nova Scotia.

The provincial NDP contended that it was not her employer, though in 1984 it had summoned her to work in two different constituencies and was the "employer of record" on her T4 tax and Unemployment Insurance forms; it merely performed these functions for the convenience of constituency organizations. These, according to counsel, were her legal employers; constituency election expense returns were produced as evidence that they paid her wages.

AWARD: The grievance failed. The arbitrator applied the Norton test, finding that control of employment was exercised by local campaign managers. On the grievor's own admission, direction of work was at the local level. She was therefore not an employee of the provincial party and did not derive seniority from its collective agreement.

AUTHORITIES: Norton (JCPC), Lord Wright.

DECISION: 85-90

Robb Engineering AND United Steelworkers of America, Local 1422

Judge J. A. MacLellan, Arbitrator

Robert Young, for the union
John P. Merrick, Q.C., for the employer
October 9, 1985

ISSUES: Skill and Ability: Burden of Proof 3:2413; Criteria of Ability and Qualifications 6:3300; Evidence: Admissibility - Relevance 3:4200, Types of Evidence - Extrinsic Evidence 3:4400; Job Posting 5:2520, 6:2310, Bona Fides 5:2300; Vacancy 5:2510; Promotion, Demotion & Transfer 6:2100.

CIRCUMSTANCES: An employee with twenty-six years' seniority, including foreman and inspector experience, alleged discrimination in the posting and selection of an operator for a new CNC (computerized numerical control) machine. Three well paid CNC jobs had been posted, with no educational qualification. But then a Grade 11 requirement was set in a posting for the job in which he was interested. He had only Grade 9, similar to employees selected for the other machines. The successful applicant for the job in question had Grade 12. The grievor demanded seniority right of first consideration under the collective agreement.

AWARD: The grievance failed. From the evidence presented, the arbitrator found that the employer had in fact lowered job requirements on the other two machines, after discussion with the union, to allow more employees to apply. It had not raised requirements arbitrarily; grievor's suspicion of bad faith was therefore unfounded. Furthermore, demonstration of the machine's use and its manual showed that, unlike the other two CNC jobs, this one required the operator to make trigonometric and geometric calculations; in this case, a minimum Grade 11 requirement was reasonable.

DECISION: 85-91

The Cove Guest House AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620

J. Bernard Boudreau, Arbitrator

T. A. Barron, for the union
M. G. Whalley, for the employer
September 24, 1985

ISSUES: Work Assignment: Contracting Out - Employees Outside Unit 5:1400, Remedies 5:1500.

CIRCUMSTANCES: On two consecutive days the Certified Nursing Assistant (CNA) scheduled to work was unable to do so due to illness. She was not replaced and the R.N.s scheduled assumed her duties. Another occasion arose when a CNA was out of the Home with a patient for part of the shift. During that period her normal duties were performed by an R.N. The union claims that these three occurrances constitute a violation of the Collective Agreement because the employer assigned bargaining unit work to persons outside the bargaining unit. The union requests a declaration that the collective agreement has been violated, and seeks compensation for lost wages to be paid to the appropriate members of the unit.

The employer argues that, because of the similarities of duties performed by the C.N.A.'s and the R.N.'s, a clearer definition of the bargaining unit is needed and that the case should be left to the Labour Relations Board.

AWARD: The grievance succeeds. Despite the similarities in duties performed by the two parties, the Arbitrator feels that it is possible to give direction without having to resort to the Labour Relations Board. Evidence suggests that certain duties can clearly be defined as belonging within the CNA bargaining unit. Consequently, on the days in question when the CNA was unavailable for work, it is clear that persons outside the bargaining unit had to perform her duties. The employer, in this case, was negligent in not arranging for another member of the bargaining unit to perform those duties.

In the case of the partial day the CNA was out of the home it would be unreasonable to expect the employer to bring in another CNA to perform her duties. Compensation is to be awarded in respect of the first two incidents, but not the third. Although this incident also constituted a violation of the collective agreement, it was of a minimal nature and posed no threat to the integrity of the bargaining unit. Jurisdiction is retained if the parties cannot agree on the amount of compensation.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration, (2nd. ed.) p. 208; Re The Holophane Company Limited and International Union of Electrical, Radio and Machine Workers, Local 540, 18. L.A.C. (2nd.) p. 79.

DECISION: 85-92

Northside General Hospital AND Canadian Brotherhood of Railway, Transport & General Workers, Local 607

J. Bernard Boudreau, Arbitrator

T. A Barron, for the union
Bob Cook, for the employer
September 24, 1985

ISSUES: Insurance and Welfare Plans: Medical Benefits and Other Benefits 8:3330; Statutory Holidays: Qualifying Days - Illness 8:3123; Statutory Holidays: Holiday Pay and Other Benefits 8:3140.

CIRCUMSTANCES: Due to an illness which required major surgery the grievor was off the job for approximately four months. She was paid sick leave for the entire time with the exception of two days, for which she was paid holiday pay. The grievor claims that she was entitled to sick pay in addition to holiday pay for these two days. Management claims that there is nothing in the collective agreement which entitles employees to substitute sick leave for statutory holiday pay.

AWARD: The arbitrator finds in favour of the grievor. The issue here is non-payment of sick pay for the two days in question. There is no clause in the collective agreement which states that both benefits cannot be collected simultaneously. If this was not the intention of either management or the union in drafting the agreement then there is an obligation to specifically deny dual entitlement. The employer is directed to pay the grievor two days sick pay. Jurisdiction is retained to settle the amount if the parties cannot agree.

AUTHORITIES: Re Moose Jaw Union Hospital and Service Employees Union, Local 299; Canadian Brotherhood of Railway, Transport and General Workers and the Northside General Hospital; Brown and Beatty, Canadian Labour Arbitration (2nd ed.) p.607.

DECISION: 85-93

Yorkdale Drywall Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 1588

J. Bernard Boudreau, Arbitrator

Ron Pink, for the union
Brian G. Johnston, for the employer
September 24, 1985

ISSUES: Discipline and Discharge: Work Performance - Carelessness 7:3520, Unsuitability 7:3530, 7:1300.

CIRCUMSTANCES: The grievor, a journeyman carpenter, was hired by the company on a construction project at the Glace Bay General Hospital. He was appointed shop steward at the time of his hiring and he worked for six weeks installing backing. After performance pressures were placed on the company by the general contract supervisor he was moved to the application of drywall. Management claims that his performance at this job was unsatisfactory and he was let go from the company's employ.

The union claims that the company violated the collective agreement when it did not provide the grievor with the sufficient warnings deemed necessary for a disciplinary discharge. Also, the agreement states that the steward, a position held by the grievor, must be the second to last man remaining on the job. This was also violated by the grievor's dismissal.

The company claims that the union violated the principles of union security when it supplied an employee who was not qualified to perform the tasks required. Consequently, it feels the union's arguments are not relevant.

AWARD: The grievance fails. The arbitrator ruled that this is a case of non-disciplinary discharge since the evidence proves that the grievor did not possess the required level of competence to apply drywall. In such cases the normal warning procedures need not be followed. However, evidence also suggests that the company hired the grievor with a clear understanding of his limitations. This negates the company's claims of violation of union security. It appears that there was other work left to be done on the project which the grievor was competent to perform, and there were other workers more qualified who could have completed the work assigned to the grievor. The employer did not make a reasonable effort to employ the grievor in a position which he was capable of performing. The company is directed to compensate the grievor for all hours normally worked from the time of his termination to the completion of the project. Jurisdiction is retained in the event the parties cannot agree.

AUTHORITIES: Re Northern Electric Company Limited (1971) 23 L.A.C. 104; Re British Columbia Telephone Company & Telecommunications Union, Marine Harbours Board and International Longshoremans and Warehousemans Union, Local 516; Re Western Marine and Teamsters Union, 12 L.A.C. (3rd.) p. 267.

DECISION: 85-94

MacLeod's Feed and Farm Supplies Ltd. AND Retail, Wholesale and Department Store Union, Local 1015

J. A. MacLellan, Arbitrator

Roseanne Skoke, for the union
Alexander G. MacDonald, for the employer
October 8, 1985

ISSUES: Seniority: Applications - Recall 6:2354; Skill and Ability: Burden of Proof 6:3200, 3:2413; Illness or Disability: Return to Work 8:3340.

CIRCUMSTANCES: The grievor, a millhand in the company's bulk feed plant, was off work on compensation. When he was able to return to work he discovered that another employee had been hired to do his job. The union maintains that the collective agreement was violated when the senior employee, the grievor, was not recalled for work when he was once again able to work.

The company claims that the new employee was hired primarily to replace the truck driver, a job which the grievor was unable to perform. This new employee worked as a millhand until the truck driver left for his vacation. The latter did not return and the replacement was kept on. Another employee was hired as a millhand for 5 days; the position was left vacant after that time. The company states that the grievor was not recalled because the new employee was 'right here'. The company also maintains that the grievor's work was unsatisfactory and they did not want to recall him after his layoff.

AWARD: The grievance succeeds. It is clear that the company violated the collective agreement when it failed to recall the senior employee when work became available. The company is entitled to hire another person as truck driver as the grievor is not qualified to perform these duties. In addition, the legitimacy of leaving a position vacant when business does not warrant an employee is not questioned. However, the company cannot lay off an employee and hire another whom they deem to be more qualified without following the procedures for termination of employment as set down in the agreement.

The grievor is to be compensated for work normally performed by him from the time he was able to return to work to the time the company decided to leave the position vacant.

DECISION: 85-95

Civil Service Commission AND Nova Scotia Government Employees Union

S. Bruce Outhouse, Arbitrator

Ronald A. Pink, for the union
Reinhold M. Endres, for the employer
September 17, 1985

ISSUES: Evidence: Skill and Ability 6:3200, 3:2413; Interpretation: Skill and Ability - Qualifications 6:3000; Skill and Ability: Burden of Proof 6:3000, 3:2413; Job Posting: Fair and Reasonable 5:2520.

CIRCUMSTANCES: This arbitration is the second between the two parties concerning a job posting issued by the Environmental Assessment Division. In the first case the employer was directed to conduct fresh competition for the position after the grievor complained regarding the outcome of that job search. A new posting was issued and this one was much more specific than the first. The grievor, fearing that the new advertisement had been written to ensure the renewed success of the previously successful applicant, has again brought the case to arbitration.

The union claims that the Departmental officials manipulated the Staffing Officers who wrote the second job posting, and therefore, have acted in bad faith. Another contention is that the specific qualifications outlined in the notice more accurately reflect the position of Environmental Technologist (pesticides) rather than Environmental Analyst. The department has failed to comply with the original arbitration judgment because it has advertised for a totally different position. The union also objects to the removal of the prerequisite of a university degree. In the second notice an equivalency of work experience was noted as being acceptable. All these arguments point to the fact that the department designed the job qualifications with a certain person in mind.

The department denies all these charges. The staffing officer realized that the original job posting did not accurately reflect the requirements of the job. These Staffing Officers, while consulting with the Department, worked independently to make the requirements more accurately reflect the position of Analyst. The duties listed relate to the activities of the department in general. The successful candidate will be responsible for these activities but he/she will not necessarily have to perform all the duties. The employer also argues that ensuring that job experience is seen in the same light as a university degree merely makes specific what was implied in the first posting.

AWARD: The grievance fails. The arbitrator finds that the arguments of the employer cannot be faulted and the union has failed to meet the burden of establishing bad faith. The job posting was not improper and it adequately reflects the analyst position.

AUTHORITIES: MacChesney, Brown and Shea and the Province of Nova Scotia, unreported; Re Montreal Children's Hospital and Federation of United Nurses (1974), 8 L.A.C. (2d) 17 (Baristow); Re Reynolds Aluminum Company of Canada Ltd. and International Molders & Allied Workers Union, Local 28 (1974), 5 L.A.C. (2d) 251 (Schiff) p. 254; Re Donohoe and Civil Service Commission (may 27, 1981, unreported; Civil Service Collective Bargaining Act, S.N.S. 1978, c.3, Section 37(1).

DECISION: 85-96

Ben's Limited AND Bakery, Confectionary & Tobacco Workers International Union, Local 446

Judge J. A. MacLellan, Arbitrator

Rene Quigley, for the union
John Landry, for the employer
October 21, 1985

ISSUES: Fairness: Construction 4:2100; Interpretation: Reasonableness 4:2100; Reasonableness: Interpretation 4:2100; Remedies: Damages 2:1410.

CIRCUMSTANCES: Under the collective agreement, the employer was obliged to provide smocks for its employees to wear on the job. Due to several delays the smocks were not provided until fourteen months after the collective agreement was signed. The employer admitted the delay was excessive but offered no explanation. The union argued that the delay was unreasonable and sought damages to compensate employees for extra cleaning bills incurred as a result of the delay.

AWARD: The grievance succeeds. The employer violated the collective agreement by not supplying the smocks in a reasonable period of time, even though no time period was explicitly stated. The arbitrator did not award the damages sought but assessed an amount of seventy-five dollars to be paid each employee.

DECISION: 85-97

Lynk Electric AND I.B.E.W., Local 1852

Douglas G. Ruck, Arbitrator

Edward MacNeil, for the union
Frank Elman, for the employer
October 28, 1985

ISSUE: Union: Supplying Employees 9:2000, Security: Check-off 9:1200.

CIRCUMSTANCES: The employer, wanting to hire some first and second year apprentices, approached the union for names of suitable employees. At that time the union responded that there were no names on the list which fit the required qualifications. There were however some higher year apprentices available who required additional hours of work in order to qualify for U.I.C. The employer agreed to hire these men. A problem arose when the union learned that the company had hired some first and second year apprentices from outside the union hiring list. The union claims that it had a waiting list which contained the names of some apprentices who would have been suitable for employment. According to the union, the company was aware of the existence of this list and the hiring of the outside workers constitutes a violation of the collective agreement. The company claims that it was not aware of the waiting list and if it had been it would have hired the men on the list.

AWARD; The grievance fails. It was the responsibility of the union to make the company aware of the existence of the waiting list. The assumption that the company was aware of it was incorrect and it would be unfair to penalize the employer based on the union's assumption. The fact that the company hired two higher apprentices did not mean that it still did not need the first and second year apprentices. After waiting the forty-eight hours required by the collective agreement the company was within its rights to seek other employees outside the union list.

AUTHORITIES: Labourer's International Union, Local 1115 vs. Turner's Transfer Limited International Brotherhood of Electrical Workers, Local 625 and Mersey Electrical and Contracting Limited.

DECISION: 85-98

Western Electrics Ltd. AND International Brotherhood of Electrical Workers, Local 625

William H. Kydd, Arbitrator

Fern Tardiff, for the union
Tibor O'Malley, for the company
October 31, 1985

ISSUES: Collective Agreement: Form and Content - Ancillary Documents - Amendments 4:1300,; Pension, Insurance and Welfare Plans 4:1400.

CIRCUMSTANCES: An amendment to the collective agreement was made on July 25, 1985 regarding an increase in the amount for the welfare or pension plan. The union claims that it is binding and that the company is not paying the apprentices their proper wage rates. The company refuses to recognize the binding nature of the amendment. The calculations in the amendment were based on a similar amendment in 1979, resulting in a 30 cent per hour diversion to the pension fund. The union claims that the employer's contribution must increase whereas the company states that the collective agreement only allows for diversion of pay and that the employer's contributions will remain the same.

AWARD: The arbitrator finds that the amendment is binding on both parties as it was executed by an official body which had the legal authority to make such an amendment. Also, according to Article 24.11 of the collective agreement the union has the discretionary right to an amendment increasing the welfare payments. It appears that the collective agreement is ambiguous in how wage rates are to be adjusted. The new amendment is consistent with the practice of both parties under the previous agreement. The company is ordered to comply with the provisions of the collective agreement and must pay the apprentices at their proper wage rates retroactive to August 1, 1985.

AUTHORITIES: Re Teamsters Union and Motor Transport Industrial Relations Bureau of Ontario (1969), 22 L.A.C. 57; Leitch Gold Mines Ltd. et al v. Texas Gulf Sulpher (1969), 3 D.L.R. 161; Re Motor Transport Industrial Relations Bureau of Ontario and Teamsters Union (1973), 4 L.A.C. 89.

DECISION: 85-99

Surrette Battery Company Limited AND International Brotherhood of Electrical Workers, Local 625

Judge J. A. MacLellan, Chairman; Robert A. Cook, Rene Quigley

Fern Tardiff, for the union
M. J. MacPherson, for the company
August 7, 1985

ISSUE: Arbitrability: Delay 2:3210; Time Limits: Waiver 2:3120; Waiver 2:3210.

CIRCUMSTANCES: This grievance centres around the employment of a cleaning lady who, as part of her regular duties is assigned bargaining unit work. The company refuses to recognize this and will not pay her union wages. A preliminary objection was raised by the company at the hearing which argued that the union had not filed the grievance within the time limits imposed in the collective agreement. This proceeding deals with this question of arbitrability only and not with the merits.

AWARD: The preliminary objection is dismissed. Evidence shows that discussion between the union and the company has been continuing for some time. The board finds that the company, by not objecting to the time limit issue earier on in the discussion has, by its conduct, waived any time limits imposed in the collective agreement.

DECISION: 85-100

The Nova Scotia Liquor Commission AND The Association of Commercial and Technical Employees, Local 1679

Peter E. Darby, Arbitrator

Raymond F. Larkin, for the union
James C. Leefe, for the employer
November 5, 1985

ISSUES: Interpretation: Words and Phrases - Employer 6:3100; Skill and Ability: Burden of Proof 6:3200, Senior Employees if Relative Equal 6:3220, Trial Training and Familiarization Periods 6:3230, Criteria and Ability and Qualifications - Education 6:3320; Interpretation: Skill and Ability - Ability 6:3000, Skill 6:3000.

CIRCUMSTANCES: The grievors allege that the employer selected an employee junior to any of them to fill a position and, in doing so, violated the collective agreement. There are three points of issue in this grievance. Firstly, the union contends that the importance of seniority rights was wrongly interpreted by the employer. The employer interpreted it as a "seniority when equal" clause as opposed to considering seniority, skill and ability as a composite. The grievors were not given final consideration because seniority was not considered a part of the whole package. The employer states that the successful candidate was superior in skill and ability and, therefore, it did not have to consider seniority at all.

Secondly, the union claims that it is within the scope of the arbitrator's mandate to determine whether the decision of the employer was correct and not merely to determine whether the employer applied the criteria for the job fairly. This particular collective agreement does not specifically state that the hiring must be based on the judgment of the employer and therefore, the arbitrator must make that judgment.

The third argument put forth by the union is that the employer used criteria for judgment that are not mentioned in the job description for the posting in the collective agreement. The criteria used, even if reasonable for the job, cannot be used in assessing candidates. The company has to be restricted to those criteria described in Schedule B of the collective agreement because this has been incorporated in the agreement by reference. These criteria refer to an employee's potential to meet employment standards. The company hired the candidate who could perform most of the tasks immediately and this gave her the 'edge' over those employees who would have to be trained. In addition, the contention is made that the successful candidate did not possess the educational requirements for the position.

AWARD: The grievances are dismissed. The arbitrator rules that the relevant clause is a 'seniority when equal' clause and therefore seniority should only be considered as a last resort. The union's second argument is rejected because it is felt that the judgment of an employer is implicit in the hiring of an employee. Consequently, it is not within the scope of the arbitrator to determine whether or not the decision was correct but merely to establish that the criteria were applied fairly. Finally, the ruling is that the criteria used for judgment bore a reasonable relation to the position offered. It is not reasonable to assume that the employer cannot consider the potential candidate who can step in and do the job immediately over those candidates who require training. In addition, the arbitrator found that the candidate's practical experience negates the lack of formal educational training and therefore, she should not be disqualified from the competition.

In sum, the arbitrator finds that there are no grounds for his interference. However, this hearing could have been avoided had the employer made its selection process more professional and accountable.

Re United Automobile Workers and Westeel Products Ltd. (1961), 11 L.A.C. 199 (Laskin); Re Island Telephone Co. and I.B.E.W., Local 1030 (1983), 8 L.A.C. (3d) 132 (Christie); Re Scarborough Centenary Hospital Association and C.U.P.E., Local 1320 (1979), 20 L.A.C. (2d) (Schiff) 142; Re General Refractories Co. of Canada Ltd. and U.S.W., Local 14857 (1976), 10 L.A.C. (2d) (Shime) 327; Re British Leaf Tobacco Co. of Canada Ltd. and Canadian Union of Operating Engineers & General Workers (1982), 3 L.A.C. (3d) (Kennedy) 235; Palmer, E.E. Collective Agreement Arbitration in Canada, (2nd ed. 1983, Butterworths) p.513-15, 575; Brown D. J. and Beatty D. M. Canadian Labour Arbitration, (2nd ed. 1984, Can. Law Book Co.) p.296, 301-02, 302-06, 309; Re Wellesley Hospital and Service Employees Union, Local 204 (1982), 2 L.A.C. (3d) (Kennedy) 193; Re Covering Council of University of Toronto and C.U.P.E., Local 1230 (1980), 24 L.A.C. (2d) (Burkett) 97; Re Halton County Board of Educaton and C.U.P.E., Local 1011 (1977), 13 L.A.C. (2d) (Shime) 113; Re Great Atlantic and Pacific Company of Canada Ltd. and Canadian Food and Allied Workers Union, Locals 175 and 633 (1979), 21 L.A.C. (2d) (Weatherill) 444; Re Kelsey Hayes Canada Ltd. and U.A.W., Local 240 (1972), 1 L.A.C. (2d) (Weiler) 54; Re District of Maple Ridge and C.U.P.E., Local 622 (1979), 23 L.A.C. (2d) (Hicking) 86; Re Governing Council of University of Toronto and C.U.P.E., Local 1230 (1979), 24 L.A.C. (2d) 97; Canadian Food & Allied Workers, Local 157 v. Great Atlantic & Pacific Co. of Canada Ltd. et al (1976), 76 C.L.L.C. 14056 (Ont. Div. Ct.), 11 L.A.C. (2d) (Brandt) 291, leave to appeal Ct. to Ct. of Appeal refused 13 L.A.C. 211n; Re Canadian Pacific Ltd. and Canadian Telecommunications Union, Division No. 1 United Telegraph Workers (1981), 28 L.A.C. (2d) (J. M. Weiler) 430 at 433; Carling Breweries Ltd. (1968), 19 L.A.C. (Christie) 110; Re Phillips Cables Ltd. and International Union of Electrical, Radio & Machine Workers, Local 525 (1977), 16 L.A.C. (2d) 345, Adams at pp. 355-6; Re Amalgamated Electric Corp. and United Electrical, Radio & Machine Workers of America, Local 514 (1949), 2 L.A.C. 591 (Laskin) at p.595; Re Canadian Trailmobile Ltd. and U.A.W., Local 397 (1975), 10 L.A.C. (2d) 92 (Adams) p.101-02; Re Kelsey Hayes Canada Ltd. and U.A.W., Local 240 (1972), 1 L.A.C. (2d) 54 (Weiler); Re International Union of Electrical, Radio & Machine Workers, Local 542 and R.C.A. Victor Ltd. (1971), 22 L.A.C. 329 (Simmons) pp.330-1; Oxford English Dictionary (1933 Clarendan Press) Vol. II p 88; Webster's Third New International Dictionary (1981 G & C Merriam Co.); The American Dictionary of the English Language (1969 Houghton Mifflin Co.) p.3.

DECISION: 85-101

L. Lewis Electric Limited AND International Brotherhood of Electrical Workers, Local 625

R. Lorne MacDougall, Arbitrator

Ronald Pink, for the union
Judith Gass, for the company
October 31, 1985

ISSUE: Union: Membership as Condition of Employment 7:7520; Work Assignment: Bargining Unit Work 5:1200; Contracting-out: Employees Outside Unit - Remedies 5:1500; Bargaining Unit: Employees Excluded - Supervisors and Foremen 5:1126.

CIRCUMSTANCES: On two separate occasions a union local member witnessed a non-union member working with the president of the latter's company on jobs. A complaint was made on both occasions and the employer promised to rectify these situations. After the second breach of the collective agreement the union felt that the only way to settle the matter permanently was to take it before arbitration. The company president states that the 'employee' in question is a shareholder of the company and, as such, he is not required to be a member of the union. It is clear however that he does work with the trade tools on certain jobs. For this reason the union considers him to be a member of the bargaining unit. He is not, however, a member of the union. The collective agreement states that all employees in this line of work must be hired from the union list.

AWARD: The arbitrator finds that despite the fact that the 'employee' is a shareholder it is also very clear that he is an employee of the company. The company is in violation of the collective agreement and if it wishes to employ this man on jobs then he must first join the union.

DECISION: 85-101B

L. Lewis Electric Limited AND International Brotherhood of Electrical Workers, Local 625

R. Lorne MacDougall, Arbitrator

Fern Tardiff, for the union
Judith Gass, for the employer
January 6, 1986

ISSUE: Remedy: Type of Remedy - Damages - Measure 2:1410.

CIRCUMSTANCES: This grievance has been brought forward with respect to settling an award from a previous hearing. The union is seeking compensation for the hours worked by a non-union employee, at the collective agreement rate with benefits commencing from the day the grievance was filed. This would apply to all construction work done by that employee whether residential, commercial or industrial. The employer has offered compensation based on the time worked from the day the arbitrator was appointed to the day the award was ordered. The employer also claims that the collective agreement does not apply to residential jobs and, therefore, the arbitrator has no jurisdiction to order payment for this type of work.

AWARD: The arbitrator finds that the agreement does apply to all sectors of the construction industry and that the employer agreed to abide by it when the 'Voluntary Recognition Agreement' was signed.

The employer was aware that the grievance had been filed on August 29, 1985 and that both sides had unsuccessfully tried to settle the grievance before the appointment of the arbitrator on October 8, 1985. The non-union employee was engaged in bargaining unit work at that time and there is no evidence to suggest that the union waived any of its rights in the respect during the negotiations. The employer is ordered to pay the union rates and benefits for violations from the date the grievance was filed until the date of the award.

AUTHORITIES: Fairview Electric Limited and International Brotherhood of Electrical Workers, Local 625, (1980), unreported.

DECISION: 85-102

The Board of Police Commissioners of the City of Sydney AND Patrick Glancey

D. J. MacDonald, Chairman; Wayne Beaton; Everett Baker

Manning MacIntyre, for the grievor
Michael Whalley, for the employer

ISSUES: Discipline and Discharge: Grounds for - Criminal Convictions 7:3422, Criminal Charges 7:3424, Off-Duty Conduct - Criminal Conduct 7:3422, 7:3427; Off-Duty Conduct 7:3010.

CIRCUMSTANCES: The officer, a constable on the Sydney police force, was convicted of three criminal offences which he committed while off-duty. The grievor was suspended from his duties on the day he was convicted and one month later he was dismissed from his position. The grievor claims that his dismissal was unjust under the collective agreement.

There is no specific section or article in the agreement which lists those acts which would result in dismissal. The Board must look elsewhere to resolve the issue.

AWARD: The grievance fails. The Nova Scotia Trade Union Act allows the Board to treat any statute of the province which governs relations between parties, as part of the collective agreement. The Police Act and Regulations emphasize the authority of the Police Board to dismiss any member of a municipal force who is convicted of a criminal offence. The Board of Arbitration finds therefore, that the Police Board has taken action pursuant to a validly executed regulation.

AUTHORITIES: Cape Breton County Correctional Centre vs. Canadian Union of Public Employees, Local 1146; Nova Scotia Police Act Regulations, section 44(2), 64(c); Trade Union Act, S.N.S. 1972, c.19; The Police Act, S.N.S. 1972, c.9, section 37, 7(3), 15(3), 64, 64(c); City of Sydney, Bylaw, 1976 section 3.

DECISION: 85-103

H. W. Corkum Limited AND Labourers' International Union of North America, Local 615

Milton J. Veinot, Arbitrator

Ronald A. Pink, for the union
C. Peter MacLellan, for the employer
September 30, 1985

ISSUES: Contracting Out 5:1300; Contracting Out: Remedies 2:1424; Contracting Out: Good Faith 4:2300; Arbitrability: Statutory Requirement 2:1100; Time Limits: Continuing Grievance 2:3128; Remedies: Types of Remedy - Damages - Measure - Temporal Limitations 2:1418; Estoppel: Condonation 2:2220; Jurisdiction: Sources - Statutes 2:1100, 2:2100.

CIRCUMSTANCES: The company was hired to build the 'papal platform' in Halifax and to take it down after the pope's visit. The company subcontracted out to Spryfield Demolition to tear down the structure. The latter company is not unionized. The company claims that when it works in areas in which unions are not active then it has no obligation to use union members. The union maintains that the collective agreement entitles its members to complete the type of work required for the 'papal platform' job. The same basic issue arose with another job at a Zellers store in Dartmouth.

The company also argues that, in both jobs, it was not bound by the collective agreement because its function was that of construction manager and not employer. Even if it were considered the employer, the doctrine of impossibility of performance would be in existence because there were no unionized companies available to do the work required. This same situation has arisen in the past and the union condoned the company's actions. Therefore the union should be estopped from proceeding with the grievance.

The company also raised a number of procedural issues in conjunction with the case. They are as follows:
1) Was the matter properly put forward under Section 103 of the Trade Union Act?
2) Does Section 103 of the Trade Union Act override the provisions in the collective agreement specifying the time within which a grievance must be proceeded with?
3) Is the grievance out of time as it violates Article 23 of the Agreement?
4) If the employer is found in breach of the collective agreement, are the damages limited to the time period required under Section 103 of the Trade Union Act for proceeding with a grievance?
5) Can the arbitrator consider any matter beyond the date of his/her appointment?

AWARD: With regards to the question of company as employer or construction manager the arbitrator finds that the contract between the company and the architects provides the former with the majority of the responsibility for the selection and direction of sub-contractors, making it the employer and, therefore, bound by the articles of the collective agreement.

The decision is split on the question of violation of the agreement by the hiring of non-union members. Past practice has shown that the company employs the non-unionized demolition company, the only qualified company available, when the work involved is deemed too complex, dangerous or dirty. The 'papal platform' job was such a case and, therefore, the company was not obliged to hire union members.

The same decision holds for the Zellers job with the exception of a few duties which were performed. The majority of the work conducted excluded the company from its obligation to hire union members. However, in a few cases non-union members were doing work which could easily have been accomplished by union members. In those cases the company was in violation of the agreement and is ordered to pay the union for time lost.

The arbitrator dismisses the plea of the doctrine of impossibility of performance stating that this doctrine applies only to the two contracting parties of the agreement. Although the company is bound by the agreement it is not one of the contracting parties (i.e. the agreement is between the union and the Construction Industry Management Labour Bureau Limited).

The company's argument for estoppel for the union is also dismissed on the grounds that in the past the company has done some of its own demolition work and has hired union employees. This case merely represents a difference of opinion as to whether the work could have been done by the union. No estoppel arises.

DECISIONS ON THE PROCEDURAL ISSUES: (1) On item 1 the arbitrator states that the appropriate section of the Act is a substitution for the arbitration proceedings in the agreement. It is the intention of the statute to get matters resolved as quickly as possible and agreements must not interfere with this. The Act overrides any prearbitration agreements of the collective agreement. (2) On item 2 it is found that the 24 hours for settlement of dispute before arbitration overrides the longer time specified in the agreement. (3) On item 3 the decision follows that of item 2. The Act overrides any articles of the agreement because of the speed of response required for settlements of disputes in the construction industry. (4) On item 4 the arbitrator finds that the language of the statute does not require any limitation on "damages" to one day. (5) On item 5 the arbitrator finds that the matter in contention, i.e. the hiring of non-union labourers, is one of a continuing nature. Consequently, he has the power to assess damages based on activities up to the date of the hearing.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (1977), p. 67, 2; Port Arthur Shipbuilding Company v. Arthurs (1969) S.C.R. 85; R v. Board of Arbitration, exp. Cumberland R.R. Co. (1968), 67 D.L.R. (2d) 135; Labourers International Union of North America, Local 615 and BIC Enterpirses Ltd (September 7, 1984); Millwrights & Machine Erectors, Local 1178 and Construction Association Management Labour Bureau Limited (January 12, 1983) (unreported); United Brotherhood of Carpenters and Joiners of America, Local 83 and Construction Industry Management Labour Bureau Limited (July 23, 1985); Union Carbide Ltd. v. Weiler et a. (1968), S.C.R. 966; International Brotherhood of Electrical Workers, Local 625 and Banner Electric Contractors Ltd. (March 7, 1985) (Veinot); Trade Union Act, S.N.S. 1972 section 103, 102, 89(k), 89(f); Ontario Labour Relations Act, section 34(1).

DECISION: 85-104

Strait-Richmond Hospital of Evanston, Cape Breton Island, Nova Scotia
AND Canadian Union of Public Employees, Local 2436

Peter E. Darby, Arbitrator

Philip Veinotte, for the employer
F. Alex Somerville, for the union
November 14, 1985

ISSUES: Skill and Ability: Senior Employee if Relatively Equal 6:3220, Burden of Proof 6:3200; Evidence: Burden of Proof - Skill and Ability 3:2413, Arbitral Review 6:3100; Interpretation: Words and Phrases - Skill and Ability - Ability 6:3000, Skill 6:3000, Qualifications 6:3000.

CIRCUMSTANCES: The grievor alleges that the employer violated the collective agreement when it selected a non-bargaining unit member to fill the position of regular fulltime cook over the grievor's application. The competition clause requires the employer to consider the seniority of the candidates to a job posting only after it has determined that two or more are relatively equal in ability and qualifications. The grievor agrees that the qualifications required were reasonable and fair.

AWARD: The grievance is dismissed. The arbitrator's role, in a case such as this, is to determine whether the employer's decision was reasonable. The decision of management must be deferred to if it is established that in applying the criteria, the employer did so honestly. Initial burden of proof lies with the grievor. In this case, based on the evidence put forward, it appears that the grievor was not as qualified as the successful applicant. The question of seniority did not even come up in management's deliberations. Suggestions for changes to the employer's hiring and job posting procedures are made.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.), 1984, Can. Law Book Co.) p. 298, 301-2, 297, 306, 307, 309, 302-306; Westeel Products Ltd. (1960), 11 L.A.C. 199 (Laskin); American Heritage Dictionary of the English Language (1969, Houghton Mifflin Co.) p.3, 1212, 1067; Canadian Food and Allied Workers, Local 175 v. Great Atlantic & Pacific Co. of Canada Ltd. et al. (1976), 76 C.L.L.C. 14,056 (Ont. Div. Ct.); leave to appeal to C.A. refused 13 L.A.C. (2d) 211n; Carling Breweries Ltd. (1968), 19 L.A.C. 110 (Christie) p.112; Trade Union Act, S.N.S. 1972, c.19, sect. 1(2)(a).

DECISION: 85-105

G & N Sweeney Construction Ltd. and Komac Construction Limited AND United Mine Workers of America, District 26

George LeVatte, Arbitrator

Terry MacVarish, for the union
Bernard Boudreau, for the employer
November 19, 1985

ISSUES: Seniority: Termination of Seniority 6:1200; Disciplinary Penalties: Loss of Seniority 7:4230;.

CIRCUMSTANCES: This case consists of two similar grievances. In both cases the grievors were penalized for turning down offers of shift work by having their seniority revoked. In both cases the company claims it was justified since the employees' reasons for not coming in to work were unsatisfactory. The union argues that according to the collective agreement employees had ten days in which to return to work before they lost their employment. Also, the company is not following its own rules for penalties of absenteeism by the disciplinary action it took in both these cases.

According to the company the ten day response period is not followed in cases of call-ins for occasional employment. While this policy does not follow the agreement it was practiced regularly in the past and was agreed to by both the employees and the union.

AWARD: The grievance succeeds and both grievors are reinstated to their previous standings on the seniority lists. The collective agreement does not properly deal with situations of stand-by employees and therefore, a decision has to be made which is in keeping with spirit of the agreement. Based on all the evidence it is clear that the penalty of loss of seniority was overly harsh.

On the matter of awarding full redress with respect to lost income, vacation pay etc. in the case of the first grievor the request is denied on the grounds that there is no evidence that the grievor informed his employer when he was well enough to work. It is allowed for the other grievor with the exception of the three days he was unable to work due to illness.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (1984), 2nd. ed. p. 263.

DECISION: 85-106

Aberdeen Hospital Commission AND The Nova Scotia Nurses' Union, Aberdeen Local

T. A. Cromwell, Chairman; D. H. McDougall; Raymond Larkin

David Reynolds, for the union
Brian G. Johnston, for the employer
November 20, 1985

ISSUES: Seniority - Acquisition 6:1100; Employees: Temporary, Casual and Part-time 5:1124; Interpretation: Words and Phrases - Employees - Temporary 5:1124.

CIRCUMSTANCES: The four grievors were among a group of recent graduates from the hospital's School of Nursing who were hired in August 1984 on what was intended to be a temporary basis in order to provide them with some experience. They were given verbal notice in April 1985, and were replaced by other recent graduates. One of the grievors has written letters withdrawing from the grievance; her case was dismissed in the result. The remaining grievors seek reinstatement.

The union argues that the grievors are 'regular' nurses within the meaning of the collective agreement and have therefore acquired seniority rights and are entitled to be recalled. Alternatively, it argues that if the grievors are 'temporary' nurses, the only other nursing classification, the hospital has breached the collective agreement in that it hired new temporary nurses instead of keeping on the grievors (Article 4.08), that 30 days notice of lay-off was not given (Article 11.04) and that lay-off can only properly be made if there is a shortage of work (Article 11.07), which is not the case here.

The hospital argues the grievors are temporary nurses, who do not accumulate seniority. The hospital claims Article 4.08 has not been breached and that Articles 11.04 and 11.07 do not apply to temporary nurses.

AWARD: The grievance succeeds. A factual finding that the grievors were hired on what was intended to be, and was understood to be, a temporary basis is not determinative of their legal status under the collective agreement. The collective agreement provides for two categories of nurses: 'regular' nurses who acquire seniority and 'temporary' nurses who do not. The majority of the arbitration board accepted a union argument supportive of protection of seniority rights: unless the grievors fit within the definition of 'temporary' nurse, they would fall within the general category of 'regular' nurse.

The definition of 'temporary' nurse includes reference to a "designated" period of time. This was interpreted as incorporating notions of specificity of time and of communication of such specified time. It is the finding of the majority that no reasonably specific period of employment was ever set for the grievors or communicated to them. They are, therefore,

'regular' nurses. The majority of the board also rejected an argument that the grievors were hired outside of the collective agreement. The grievors are to be reinstated forthwith, with compensation from the date of the grievance to date of reinstatement.

The hospital's plan to provide a series of nursing graduates with experience failed because of its inattention to the terms of the collective agreement. The majority of the Board appreciates the hospital's good intentions, but feels while the result may seem inequitable, any alternative solution will have to be sought by negotiations between the parties.

The alternative arguments advanced were also considered. Article 11.04 was not considered to apply to temporary nurses, who are hired for designated periods. The application of this article to lay-off of temporary nurses before the end of such a designated period was not considered. Article 4.08 includes a provision that the hospital shall "make every effort to have one nurse" fill temporary positions. The Chairman interpreted this to mean that subdivision of interim periods between two or more nurses is to be avoided.

ADDENDUM OF MR. RAYMOND LARKIN: Mr. Larkin concurs with the award and the reasons, but differs over the interpretation of Article 4.08. Mr. Larkin argues for an interpretation more consistent with job security, i.e. that the hospital should seek to have a temporary nurse already in its employ to fill in new designated periods as they arise. With this interpretation, even if the grievors had been found to be temporary nurses, the hospital would have been required to hire them for the new designated periods rather than hiring other graduates. The award would then be the same as decided.

DISSENT OF MR. DONALD H. MCDOUGALL: It is the view of Mr. McDougall that the approach of the majority in interpreting the collective agreement with a predisposition in favour of protecting seniority rights constitutes an error in law. Mr. McDougall sets out several specific points of disagreement with the majority which he attributes to this basic error. He concludes the grievors were temporary nurses and that the grievance should be dismissed.

SUPPLEMENTARY REASONS OF MR. T. A. CROMWELL: This is a rebuttal to the dissent which affirms the interpretive approach taken by the majority and states that this approach did not affect the weighing of the evidence. The specific points of the dissent are reviewed.

AUTHORITIES: Tung-Sol of Canada Ltd. (1964), 15 L.A.C. 161 (Reville); Shaw et al v. The Cape Breton District School Board et al (unreported), June 21, 1984, N.S.S.C.T.D. (MacIntosh, J.); Chambers Twentieth Century Dictionary (1972).

DECISION: 85-107

The Nova Scotia Liquor Commission AND Association of Commercial and Technical Employees, Local 1670

R. Lorne MacDougall, Arbitrator

N. Blaise MacDonald, Roy Dickey, for the union
James C. Leefe, for the employer
November 17, 1985

ISSUES: Discipline and Discharge: Grounds for - Failure to get along with Work Mates 7:3580, Just Cause 7:1200; Disciplinary Penalties: Culminating Incident 7:4310; Type of Penalty: Demotion 7:3544; Mitigating Factors: Employee's State of Mind 7:4424, Personal or Emotional Problems 7:3430, Provocation 7:4412, Rehabilitative Potential 7:4422, Reasonableness 7:4300.

CIRCUMSTANCES: The grievor was demoted from manager to store clerk on February 4, 1985 as a result of a series of staff-related incidents, dating back for over one year, which are characterized by the employer as "conduct unbecoming a manager." The incidents included episodes of loss of temper, fighting with a subordinate, shouting, and two incidents involving a female employee which demonstrated a lack of common sense and insensitivity. The grievor argues the penalty was imposed without just cause.

AWARD: The grievance succeeds. While the behaviour that was punished deserved discipline, permanent demotion is considered too harsh a penalty. The grievor is to be treated as having had a four month demotion and to have been reinstated with full pay and benefits as of June 4, 1985. Mitigating factors included personal stress of the grievor, poor health and provocation as regards the incident of fighting. The two incidents involving the female employee were found to be "conduct unbecoming a manager", and no mitigating factors were considered in these instances. The doctrine of culminating incident was not found to apply to the grievor.

AUTHORITIES: Re Sasso Disposal Limited and Teamsters Union, Local 880 (1975), 9 L.A.C. (2d) (Gorsky) at 155 taken from Re John Inglis Co. Ltd. and U.S.W., Local 2900 (1973), 2 L.A.C. (2d) 155 (O'Shea); Brown and Beatty, Canadian Labour Arbitration (2d) page 475; Re Air Canada and Canadian Air Line Flight Attendants Association (1979), 22 L.A.C. (2d) 371 (Adams); Collegiate/Arlington Sports, a Division of Imasco Retail Inc. and Retail, Commercial and Industrial Union (unreported) (S.M.Beck).

DECISION: 85-108

Brookfield Foods Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 503

Bruce Outhouse, Arbitrator

Ted Powell, for the union
James Leefe, Karen Hudson, for the employer
December 3, 1985

ISSUES: Discipline and Discharge: Grounds for - Work Performance - Carelessness 7:3510, 3520; Disciplinary Penalties: Types of Penalty - Demotion or Transfer 7:3520, 7:3544; Promotion, Demotion or Transfer: Demotion or Transfer - Nondisciplinary - Incompetence 7:3510.

CIRCUMSTANCES: The grievor was demoted from his position of delivery truck driver following his sixth accident in three years. He had previously received two written warnings and been suspended for one day. The union argues that the demotion was not justified, that the employer could have sent the grievor for training and there is no accident review procedure.

AWARD: The grievance fails. The employer acted within its rights; the evidence indicated the grievor was responsible for the accidents. There is no obligation on the employer to send the grievor for training, and the matter of an accident review procedure should be pursued at the bargaining table. No ruling is made on the permanency of the demotion. It is suggested the grievor seek training at his own expense in order to qualify for his former position.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) pp. 421-427; Re Steel Company of Canada Limited and United Steelworkers, Local 1005 (1974), 7 L.A.C. (2d) 132 (Beatty); Re Newman Steel Warehouse and United Steelworkers, Local 8214 (1977), 16 L.A.C. (2d) 386 (O'Shea).

DECISION: 85-109

Glace Bay General Hospital AND Canadian Brotherhood of Railway, Transport and General Workers Union

R. Lorne MacDougall, Arbitrator

Tom Barron, for the union
Brian G. Johnston, for the employer
December 5, 1985

ISSUES: Innocent Absenteeism 7:3210; Illness or Disability: Burden of Proof - Return to Work 8:3342; Employer Response: Alternatives to Termination - Absenteeism 7:3200, 7:3210, 7:3220, 7:3240, Proof of Recovery 8:3342, Rehabilitative Potential 7:3220.

CIRCUMSTANCES: The grievor was dismissed because of her record of excessive absenteeism. She seeks reinstatement with compensation for lost wages.

AWARD: The grievance is allowed, with conditions for reinstatement. The grievor's alcoholism is presently under control and she is receiving help. In the circumstances, the grievor has rebutted the inference which the employer was entitled to draw from her past record of excessive absenteeism. On the balance of probabilities she is likely to regularly attend work in the future. No compensation is awarded. The grievor is to be reinstated within 10 days of the date of this award, with conditions that she continues attending the AA program and that she maintains an average attendance record. If the grievor faults either of these conditions she may be terminated forthwith.

AUTHORITIES: Re Canada Post Corporation and Canadian Union of Postal Workers (1982), 6 L.A.C. (3d) 385 (Burkett); Local Union No. 1928, I.B.E.W., and the Nova Scotia Power Corporation (Wayne Devlin), 1984, (Archibald).

DECISION: 85-110

G & M Sweeney Construction Limited and Komac Construction Limited AND United Mine Workers, District 26

George R. LeVatte, Arbitrator

Mr. Terry McVarish, for the union
Mr. Bernard Boudreau, for the employer
November 26, 1985

ISSUES: Collective Agreement: Term of Operation - Retroactivity 4:1610; Retroactivity 2:1200, Non-Monetary Items 8:1300; Seniority: Termination of Seniority 6:1200; Supervisors: Promotion Out of Unit - Applications of Seniority 6:2000; Time Limits: Continuing Grievance 2:3128, Relief Against Non-Compliance 2:3140.

CIRCUMSTANCES: A preliminary objection on time limits for bringing the grievance was raised by the employer, who argued that if retroactivity applies at all, then the grievance is time-barred as it was not raised within 60 days of the first occurence of the incident giving rise to the grievance.

A collective agreement effective June 1, 1984 to May 31, 1986 was signed February 13, 1985. It provided, inter alia, that "Any employee, who after the effective date of this collective agreement, is promoted to a position exempt from coverage under this agreement, shall be considered a probationary exempt employee for an aggregate period of sixty (60) working days in any contract year. During the sixty (60) day probationary period, he may return to his previous classified job without loss of seniority or panel rights."

An employee worked as a relief foreman more than sixty days between June 2, 1984 and May 31, 1985. However, he worked as a relief foreman only 57 days between February 13, 1985 and May 31, 1985. The union seeks to have the employee's name removed from the seniority list. The employer argues retroactivity does not apply to this case.

AWARD: The preliminary objection is overruled as the union was misled by the employer's statement that no union employee was in the position of having worked more than 60 days in the contract year as a supervisor.

The grievance is dimissed. Retroactivity does not apply to this provision of the agreement. If retroactivity were held to apply, the employee in question would have lost his seniority on February 13, 1985 without having the opportunity to return to his previous classified position.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed.) 4:1610; Penick Canada Ltd. (1966), 17 L.A.C. 296 (Weatherill); Penticon & District Retirement Service (1977), 16 L.A.C. (2d) 97 (Weiler); Re Canadian Canners Ltd. and International Association of Machinists, (1974), 4 L.A.C. (2d); Re Bell Canada and Communications Workers of Canada (1975), 15 L.A.C. (3d).

DECISION: 85-111

Atlantic Building Cleaning Ltd. AND Teamsters, Chauffeurs, Warehousemen, Helpers & Miscellaneous Workers Union, Local 927

Bruce Outhouse, Aribrator

Mark Saule, for the union
Terry Roane, for the employer
December 11, 1985

ISSUES: Discipline and Discharge: Grounds for - Theft 7:3310, 7:3312, 7:3314; Disciplinary Penalties: Specific Penalty 7:4100; Arbitral Review 7:4100, Types of Penalty - Set by Collective Agreement 7:4100.

CIRCUMSTANCES: The grievor was dismissed for taking and eating a donut from the premises of one of the employer's clients. The employer has a strict policy on theft and pilfering, and has warned all employees. The penalty for theft as set by the collective agreement is dismissal. The employer argues the arbitrator cannot substitute a lesser penalty. The union argues the penalty is too severe.

AWARD: The grievance is dismissed. There is no doubt of the grievor's guilt; the insignificant value of the item is not a protection, given the position of trust the employer and its employees occupy. The arbitrator has no jurisdiction to vary the penalty as set by the collective agreement.

AUTHORITIES: Valley Rite-Mix Limited v. Teamsters, Local Union 213 (1975), 1 W.W.R. 685 (B.C.C.A.); Re Spruce Falls Power & Paper Co. Ltd. and International Brotherhood of Pulp, Sulphite and Paper Mill Workers, Local 89 (1972), 2 L.A.C. (2d) 91 (Abbott); Re Hamilton Street Railway Company and Amalgamated Transit Union, Division 107 (1972), 1 O.R. 270 (H.C.); Re United Automobile Workers, Local 200 and Ford Motor Co. of Canada Ltd. (1970), 22 L.A.C. 35 (Weatherill); Re Bakery, Confectionery & Tobacco Workers International Union, Local 446 and Bolands (January 28, 1983), unreported (MacLellan); Criminal Code, R.S.C. 1970, c.C-34, s.283; R. v. Pace (1964), 4 N.S.R. 408 (N.S.S.C. in banco).

DECISION: 85-112

MacIntyre Chevrolet-Oldsmobile Limited AND Canadian Brotherhood of Railway, Transport and General Workers, Local 504

J. Bernard Boudreau, Arbitrator

Victor Tomiczek, for the union
T. J K. Gillis, for the employer
October 8, 1985

ISSUES: Job Classification and Description: Creation or Revision 5:2000, Change of Workload 5:2410; Work Assignment: Compliance with Wage Structures 5:2400.

CIRCUMSTANCES: In a previous arbitration procedure (MacIntyre Chevrolet-Oldsmobile Limited and Canadian Brotherhood of Railway, Transport and General Workers, Local 504, Elman, June 11, 1984, summarized 84-58) the grievor contested his demotion to No. 2 parts clerk from No. 1 parts clerk as a result of a company layoff. His duties had not changed in any way and he was being paid at a lower salary. The arbitrator for that case agreed that the grievor's duties had not changed and ordered the employer to provide back pay and a reinstatement. The money was paid but the grievor was again demoted. In this grievance the union again wants the grievor reinstated and given back pay. In addition they request that the company provide them with a written explanation of the job content and responsibilities of the various parts department employees.

AWARD: The grievance succeeds. The arbitrator finds that the grievor's duties had not changed since his demotion. This decision is based on the finding that the classifications No. 1 and No. 2 parts clerk are based on job experience and skill and not on duties. The designations as outlined in the collective agreement are primarily for pay purposes. The request that the employer provide the union with written job descriptions is denied for that reason. The employer is ordered to reinstate the grievor and provide him with back pay.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitrations, p.223.

DECISION: 85-113

The Municipality of the County of Colchester AND The Municipality of the County of Colchester Correction Officers Association, Local 124 of the Police Association of Nova Scotia.

S. Bruce Outhouse, Chairman; Charles A. MacDougall; D. Arthur Nichols

Bruce W. Evans, for the union
James C. Leefe, for the employer
December 6, 1985

ISSUES: Discipline and Discharge: Grounds for - Sleeping on the Job 7:3570; Work Performance: Isolated Incident 4:3542; Disciplinary Penalties: Arbitral Review - Scope 7:4100, Substitution of Penalty 7:4000; Mitigating Factors: Economic Hardship 7:4426.

CIRCUMSTANCES: The grievor, a correction officer, has been suspended for 12 shifts because he was found sleeping on the job. There are 3 persons on each shift, a supervisor and 2 correction officers. Rounds must be done by 2 persons every 30 minutes while the third watches the monitors. The 3 men on duty rearranged the workload to suit themselves, one doing rounds, one doing paperwork etc. The grievor made up a bed for himself at 3 a.m. and laid down and relaxed with his back to the monitors. He maintains that at no time was he asleep. The supervisor was aware of his actions and was relaxing as well. When management learned of the situation both men were suspended and an investigation was carried out. The grievor was given a 12

shift suspension and he was moved to another shift. This meant he was the junior officer and could no longer qualify to act as shift supervisor when one was needed. This represented an occasional pay loss for him. The union maintains that the penalty was too harsh and they ask for substitution of a warning. They argue that: 1) the grievor had his supervisor's tacit consent and therefore he did not feel he was doing anything wrong; 2) his previous good record should be considered; 3) both men were given the same penalty and this was unfair given the supervisor's greater responsibility; and 4) senior management had previously recommended a 6 week suspension.

AWARD: The Board finds this is a proper case for penalty substitution and a more lenient penalty of a 4 week suspension is awarded. This conclusion is reached due to the mitigating factors involved.

DISSENT (Nichols): Mr. Nichols argues that, in fact, the supervisor and the grievor were treated differently since the former was also demoted because of his actions. However, he still feels that some distinction should be made between the two employees. An 8 week suspension is recommended.

AUTHORITIES: Re Tousignant and Treasury Board (1979), 26 L.A.C. 132 (Garant); Re National Grocers Company Limited and Retail, Wholesale and Department Store Union, Local 414 (1975), 10 L.A.C. (2d) 124 (O'Shea); Re Mine, Mill and Smelter Workers, Local 598 and Falconbridge Nickel Mines Limited (1956), 7 L.A.C 130 (Little); Re Canadian National Railways Police Association and Canadian National Railway Company (1966), 18 L.A.C. 12 (Clarke); Bruce Young, State of Suspension, pp. 221-223; Brown and Beatty, Canadian Labour Arbitration (2nd ed.), pp. 432-433; Amalgamated Transit Union, Local 508 v. Metropolitan Transit Commission of Halifax, Dartmouth and Municipality of the County of Halifax (June 20, 1983), unreported (Outhouse); Re Volvo Canada Limited and United Automobile Workers, Local 720 (1984), 16 L.A.C. (3d) 153 (Outhouse).

DECISION: 85-114

Twin Oaks Memorial Hospital AND Twin Oaks Memorial Hospital Local of the Nova Scotia Nurses Union

Claude H. Foisey, Chairman; Donald H. McDougall; Raymong F. Larkin

David Reynolds, for the union
Eric Durnford, for the employer
December 20, 1985

ISSUE: Vacation: Computation of Vacation and Vacation Pay 8:3220, 8:3230.

CIRCUMSTANCES: This case revolves around interpretation of the provisions of the collective agreement with respect to vacation accumulation and entitlement. The employer's argument is that a nurse hired before April 1,1983 with four years of completed service in 1984-85 is not entitled to

four weeks (150 hours per year) vacation time until the vacation year 1985-86, i.e. the vacation year after the year in which the four years' service was completed. The union argues that pre-1983 nurses who complete four years' service in 1984-85 are entitled to 4 weeks of vacation in the 1984-85 vacation year.

AWARD: The grievance succeeds. The employer is incorrectly equating "rate" and "pro-rate" to prorate annual vacations based on months, weeks or days worked by the employee. Vacation should be apportioned on a yearly rate on a prospective basis. The employer is directed to compensate the grievors on the basis of the applicable rate (150 hours per year).

DISSENT (McDougall): The majority award is in error because the agreement sets the rate of hours of vacation at 112.5 hours per year (for employees who have worked less than 4 years) not per vacation year. The approach taken by the Board is not one of calculation of vacation on an ongoing yearly or 12 monthly rate but one of simply taking the number of years of service on the last anniversary date. This is not consistent with the appropriate sections of the collective agreement.

DECISION: 85-115

Eastern Drywall Acoustics Limited AND United Brotherhood of Carpenters and Joiners of America, Local 83

William H. Kydd, Arbitrator

Gordon Forsythe, for the union
Jack Innes, for the employer
December 23, 1985

ISSUES: Discipline and Discharge: Grounds For - Work Performance - Culpable Incompetence 7:3510; Carelessness 7:3510, 3520; Just Cause 7:1300; Warning: Failure to Warn 7:3542, 7:4416.

CIRCUMSTANCES: The employee, an apprentice drywaller was discharged from his job. The union claims that the employer did not have proper and sufficient cause for such an action and, even if it had, the requirements of the agreement with regards to discharge were not followed.

The company claims that it had sufficient cause because the grievor did not show any interest in his job and he was not working up to standard. This had been communicated to the employee on a previous occasion and it was this second incident which resulted in discharge. In any case, the article in the agreement referred to by the union deals only with discipline and not discharge.

AWARD: The grievance succeeds. The arbitrator finds that the employer did not have the right to terminate the employ of the grievor. The employer did warn the grievor that his work was not up to standard and generally this is sufficient cause since the arbitrator must rely on management's judgment. However, in this case, the grievor was never informed that his job was at risk. This is a case of culpable non-performance and the agreement does impose on the employer an obligation to comply with Article II prior to dismissing an employee. Certain exemptions are specified but his case is not one of them. The employer should have disciplined the employee in the form of a written warning. The employer is ordered to reinstate the grievor but not to reimburse him for lost pay.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) p. 411, 412, 415, 418; Pipefitters v. Fraser Bruce Engineering Company Limited (1968), 19 L.A.C. 258; Edith Cavall Private Hospital and Hospital Employees Union, Local 180 (182), 6 L.A.C. (3d); Dairies Producers Cooperative Limited v. Lyons et. al (1982) 132 D.L.R. (3d) 1 (Supreme Court of Canada).

DECISION: 85-116

Nova Scotia Government AND Nova Scotia Government Employees Union

Milton J. Veinot, Arbitrator

Ronald A. Pink, for the union
Reinhold Endres, for the employer
November 30, 1985

ISSUES: Disciplinary Penalties: Types of Penalties - Nature of Penalties 7:4210; Evidence: Burden of Proof - Applications - Discipline 3:2411.

CIRCUMSTANCES: The grievor is the Deputy Fire Marshall responsible for fire investigations in the province of Nova Scotia. On March 28, 1985 a memorandum, originating from the Department of Attorney General was circulated to Chiefs of Police, the R.C.M.P. and Prosecuting Officers of the province. The memorandum stated that these persons were not to prosecute and lay charges in any case dependent on the grievor's evidence. They were to conduct their own investigations and engage other experts if so required.

The grievor claims that this memorandum constitutes an act of discipline by his employer and it has, in fact, hindered him from carrying out his official duties as Deputy Fire Marshal. The employer maintains that it was not an act of discipline and consequently this is not an arbitrable matter.

The arbitrator must decide: 1) if this is an act of discipline; 2) if not then the grievance must be dismissed, but if it is then was there just cause for the discipline; and 3) if not, what remedy must be made to the grievor.

AWARD: The grievance is dismissed. The arbitrator finds that the writing of the memorandum was not an act of discipline. The author of the memorandum had no de facto control over the grievor and no right to direct his activities in any way. Management has retained the right, by means of the collective agreement, to order and direct its workforce. Legislation states that this is the responsibility of the deputy head of the particular department. The Department of the Attorney General cannot discipline an employee of another department. Therefore it cannot be argued that the Attorney General's department was acting as employer.

The arbitrator adds that if he had found this to be an arbitrable matter he would have ruled that there was not just cause for such action and the employer would be ordered to provide the employee with a record of his exoneration. The memorandum could never be used against the grievor.

AUTHORITIES: Brown and Beatty, Canadian Labour Arbitration (2nd ed., 1984) p.467; Re The Queen in Right of Canada and Evans et. al., 1 D.L.R. (4d) 328; Re Children's Aid Society of Ottawa and Ontario Public Service Commission (1978), 18 L.A.C. 437; Salhany, Canadian Criminal Procedure (3rd ed., 1978) p.204; Fire Prevention Act, section 2(d), 4,7(1), 8(1), 8(2), 10, 11, 12, 13, 14; Civil Service Act; Public Service Act rev. statutes 1967, c.255, sect. 1, c.3 1932, c.3 s.9 1980, c.3 section 10.

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PART 4

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